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NOTES

THE FUTURE OF *ROE v. WADE* IN THE SUPREME COURT: DEVOLUTION OF THE RIGHT OF ABORTION AND RESURGENCE OF STATE CONTROL

The legal status of abortion was exclusively within the province of the state legislatures until 1973,¹ when the United States Su-

¹ See *Roe v. Wade*, 410 U.S. 113, 116-18 (1973). The Texas criminal abortion legislation at issue in *Roe v. Wade* was "typical of those . . . in effect in many States for approximately a century." *Id.* at 116. Prior to the codification of abortion law, the majority of states adhered to the pre-existing English common law which permitted abortion before "'quickening,'" the first movement of the fetus in the womb, usually appearing between the 16th and 18th week of pregnancy. *Id.* at 132, 138 (citing DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1261 (24th ed. 1965)). In 1821, Connecticut, the first state to enact abortion legislation, criminalized abortion of a quick fetus. *Id.* at 136, 138 (citing CONN. STAT., tit. 20, § 14 (1821)). In 1828, New York enacted legislation that served as the basis for other early state anti-abortion statutes by classifying abortion of an unquickened fetus as a misdemeanor and that of a quick fetus, as second-degree manslaughter while providing an exception in both circumstances for abortions necessary to preserve the life of the mother. *Id.* at 138 (citing N.Y. REV. STAT., pt. 4, c. 1, tit. 2, art. 1, § 9 and tit. 6, § 21 (1829)). By the late 19th century, most states had eliminated the quickening distinction from statutory law and increased the degree of the offense and its penalties. *Id.* at 139. Increasingly restrictive abortion statutes culminated in a complete ban of abortion in most states by the end of the 1950's. *Id.*; see also LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 42 (1990). A movement to reform strict abortion laws began in 1967 when twenty-eight state legislatures considered liberalization bills, with twelve states passing such bills by 1970. *Id.* (citing EVA RUBIN, ABORTION, POLITICS AND THE COURTS 18 (2d ed. 1987)). These reforms were generally based on a revision of the Model Penal Code by the American Law Institute (ALI). *Id.* at 36. The revision to the code added three defenses to a charge of criminal

preme Court ruled on the constitutionality of laws prohibiting abortion in the landmark case of *Roe v. Wade*.² In *Roe*, the Court declared that the fundamental right of privacy³ protects a wo-

abortion: 1) the pregnancy would gravely impair the physical or mental health of the mother; 2) the child was likely to be born with serious physical defects; and 3) the pregnancy resulted from rape or incest. *Id.* The Model Code also required two doctors to certify the circumstances for the woman's abortion. *Id.* Although these reforms were intended to make exceptions on the basis of health, continued inflexibility on the part of the states and excessive costs kept legal abortions out of reach, especially for indigent women. *TRIBE, supra*, at 43. The ineffectiveness of these reforms spurred on a movement for the repeal of criminal prohibitions of abortion. *Id.* at 43-49.

For the background and political climate underlying abortion legislation in America, see generally CELESTE M. CONDIT, *DECODING ABORTION RHETORIC* 22-58 (1990) (recounting development and operation of opposing sides of abortion debate in America against historical background); NANETTE J. DAVIS, *FROM CRIME TO CHOICE* (1985) (providing social transformation of abortion); JAMES C. MOHR, *ABORTION IN AMERICA* (1978) (characterizing origins, development and status of abortion in America); ROSALIND P. PETCHESKY, *ABORTION AND WOMAN'S CHOICE* 67-138 (rev. ed. 1990) (examining history of abortion in light of state policies of fertility, population control and sex control); PATRICK J. SHEERAN, *WOMEN, SOCIETY, THE STATE AND ABORTION* 49-59 (1987) (summarizing history of abortion from pre-Christian times, focusing on abortion practices and policies in America throughout past 200 years); Joseph W. Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. PITT. L. REV. 359, 365-416 (1979) (reviewing Anglo-American history of abortion against impact of medical technology). For criticism of *Roe's* reliance on abortion's legal foundations, see generally William B. Hollberg & Stephen M. Krason, *The Law and History of Abortion: The Supreme Court Refuted*, in J. DOUGLAS BUTLER & DAVID F. WALBERT, *ABORTION, MEDICINE AND THE LAW* 196-210 (3d ed. completely rev. 1986) (asserting Supreme Court's use of history of abortion as problematic and unfounded); Dennis J. Horan & Thomas J. Balch, *Roe v. Wade: No Justification in History, Law or Logic*, in *ABORTION AND THE CONSTITUTION* 60-70 (Dennis J. Horan et al. eds., 1987) (accusing *Roe* majority of manipulating early civil law and conflicting common law of abortion to circumvent its historical disfavor).

² 410 U.S. 113 (1973).

³ *Id.* at 152-55. The Supreme Court grounded the fundamental right of abortion in the right of privacy. *Id.* at 153. The Court stated that although the Constitution does not explicitly mention any right of privacy, a guarantee of certain areas or zones of privacy does exist. *Id.* at 152. In varying contexts, the right of privacy has been found to stem from the First, Fourth, Fifth and Ninth Amendments, the penumbras of the Bill of Rights and from the liberty guarantee of the Fourteenth Amendment. *Id.* (citations omitted). As the right of privacy expanded to marital activities, procreation, contraception, family relationships, child rearing and education, so too was this right "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 152-53 (citations omitted). The Court predicated its decision on the "detriment that the State would impose upon the pregnant woman by denying this choice altogether." *Id.* at 153.

This guarantee of personal privacy has been characterized as a fundamental right which can be abridged only when there is a "compelling state interest." *Id.* at 152, 155 (citations omitted). Maternal health, prenatal life and medical standards are values which may rise to the level of compelling state interest as the need to protect and preserve them increases. *Id.* at 155.

The majority's extension of a right of privacy to a woman's decision to terminate her pregnancy brought similar dissents from Justices Rehnquist and White. *Id.* at 167, 171-78 (Rehnquist, J., dissenting), 221-23 (White, J., dissenting). Both Justices argued that the

man's right to choose whether to terminate her pregnancy within a trimester framework.⁴ The shockwaves emanating from this decision have stirred up powerful emotional and political opinions.⁵

right to choose was not fundamental, but merely a form of liberty, not to be withheld without due process of law as guaranteed by the Fourteenth Amendment. *Id.* at 172-73 (Rehnquist, J., dissenting). Thus, permissive or restrictive abortion legislation could be enacted by the states as long as it bore "a rational relation to a valid state objective." *Id.* at 173 (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955)). See generally LYNN D. WARDLE, *THE ABORTION PRIVACY DOCTRINE* 3-18 (1981) (analyzing and criticizing *Roe v. Wade* for its basis on right of privacy); William Van Alstyne, *Closing the Circle of Constitutional Review from Griswold v. Connecticut to Roe v. Wade: An Outline of a Decision Merely Overruling Roe*, 1989 DUKE L.J. 1677, 1678-83 (asserting great disparity between right of privacy to contraception in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Roe's* right of privacy to "destroy third-party life in gestation"); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935-36 (1972-73) (characterizing freedom to choose abortion as mere liberty interest to be accorded Fourteenth Amendment due process of law and calling "super-protected" right in *Roe* "frightening"). But see generally HYMAN RODMAN & BETTY SARVIS, *THE ABORTION CONTROVERSY* 57-59, 64-66 (1974) (confirming right of privacy in *Roe*); Alan Freeman & Elizabeth Mensh, *The Politics of Virtue: Animals, Theology and Abortion*, 25 GA. L. REV. 923, 1103 n.681 (1991) (acknowledging *Roe's* right of privacy rationale as derived from *Griswold*).

⁴ See 410 U.S. at 164. During the first trimester of pregnancy, i.e., the first twelve weeks, the state may not interfere with a woman's decision to terminate her pregnancy because such decision is left to the woman in consultation with her physician. *Id.* For the second trimester, the state may, if it chooses, regulate the abortion procedure in ways reasonably related to maternal health. *Id.* Upon viability, i.e., the point at which the baby is able to maintain an independent existence or to live after birth outside the womb, see DORLAND'S POCKET MEDICAL DICTIONARY 721 (22d ed. 1977), which occurs during the final trimester, the state has an interest in the potentiality of human life and may, if it chooses, regulate or even proscribe abortion except when necessary to save the life of the mother. 410 U.S. at 164-65. Thus, a state criminal abortion statute, allowing abortion only in cases to save the life of the mother, is violative of the Due Process Clause of the Fourteenth Amendment. *Id.* at 164.

⁵ See *National Org. for Women (NOW) v. Operation Rescue*, 726 F. Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991). This suit was initiated by abortion clinics and abortion rights organizations that sought to permanently enjoin the anti-abortion organization, Operation Rescue, from, inter alia, trespassing on, sitting in, blocking, impeding or obstructing ingress into, or egress from, any facility offering abortion services and related medical and psychological counseling in the Washington D.C. metropolitan area. *NOW*, 726 F. Supp. at 1486-87, 1489. The case is representative of nationwide "rescue" demonstrations intended to prevent access to abortion clinics by pregnant women. *Id.* at 1490 nn.5-10 (citing federal cases in which such demonstrations were enjoined). The defendants and their activist followers seek to prevent abortions, to discourage women from seeking abortion services and to convey the "moral righteousness and intensity of their anti-abortion views." *Id.* at 1488. The demonstrations were held to be violations of 42 U.S.C. § 1985(3), viz. a conspiracy to interfere with women's right to interstate travel and conspiracy to interfere with privacy rights, as well as state violations of trespass and nuisance. *Id.* at 1492-95; *NOW*, 914 F.2d at 586. Although the First Amendment did not give license to engage in unlawful conduct or to impede access to clinics, activities that intimidated, harassed or disturbed clinic patients were protected by the free speech guarantee, provided they did not infringe on a person's right of access to an abortion clinic. *NOW*, 726

In the years following *Roe*, the Supreme Court has shielded the right of abortion from attack by state legislatures,⁶ pro-life constituents,⁷ and growing internal dissent.⁸ A number of decisions,

F. Supp. at 1497. The Supreme Court heard oral arguments for the *Bray* case on October 16, 1991. Ruth Marcus, *Use of KKK Law Against Anti-abortion Protestors Argued Before Court*, WASH. POST, Oct. 17, 1991, at A11.

Anti-abortion demonstrations have been notably vivid in the history and development of abortion law. See Dinah R. PoKempner, Note, *The Scope of Noerr Immunity for Direct Action Protestors: Antitrust Meets the Anti-Abortionists*, Note, 9 COLUM. L. REV. 662, 662-63 (1989) (portraying anti-abortion demonstrations as militant, noisy and sometimes violent and discussing possible antitrust immunity for these "political" demonstrators); James G. Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 315 (1990) (characterizing abortion demonstrations as intensely passionate, moral and consequently political); Dudley Clendinen, *U.S. Sends Warning of Potential Threat to Abortion Clinics*, N.Y. TIMES, Jan. 11, 1985, at A1 (reporting warning issued by federal government to abortion clinics to protect against potential bombing and arson on twelfth anniversary of *Roe v. Wade*); Joseph B. Cumming, Jr., *Right-To-Life—Two Crusaders*, NEWSWEEK, Mar. 3, 1975, at 29 (describing graphic and emotional slide lecture series presented nationwide by anti-abortion missionaries); Juan Williams, *10 Held in Protest at Abortion Clinic*, WASH. POST, Dec. 3, 1978, at B5 (reporting arrest of protestors who entered medical procedures area of clinic chanting, praying and crying).

⁶ See Mark E. Chopko & Helen Alvare, *Legal Issues in a Post-Webster World*, 34, No. 1 CATH. LAW. 115, 116 (1991). In the years following *Roe v. Wade*, "the Supreme Court further extended and reinforced . . . decisional freedom and eliminated all meaningful regulation of abortion through rejection of every challenge presented, save funding restrictions and limited parental interests." *Id.* (citations omitted); TRIBE, *supra* note 1, at 15 (noting that anti-abortion legislatures attempted to undermine *Roe* with provisions just slightly less restrictive than those pre-*Roe*); Christopher A. Crain, Note, *Judicial Restraint and the Non-Decision in Webster v. Reproductive Health Services*, 13 HARV. J. L. & PUB. POL'Y 263, 263 (1990). Since its decision in *Roe v. Wade*, the Supreme Court rather than the states has primarily controlled regulation of abortion through *Roe* and its "progeny." *Id.*; see, e.g., Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 759 (1986) (invalidating detailed fetal development and similar informed consent information as methods "to intimidate women into continuing pregnancies"); Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft, 462 U.S. 476, 482 (1983) (holding mandatory hospitalization for second trimester abortions unconstitutional); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 427 n.10 (1983) (allowing parental consent of minor child's decision to abort when judicial bypass is alternative form of approval); Bellotti v. Baird, 443 U.S. 622, 639, 648 (1979) (requiring that parental consent have quick and confidential judicial bypass alternative); Colautti v. Franklin, 439 U.S. 379, 391-92 (1979) (invalidating viability provision requiring doctors to refuse to abort viable fetus or to provide for its live birth); Planned Parenthood v. Danforth, 428 U.S. 52, 67-74 (1976) (disallowing spousal veto, spousal consent in first trimester, and absolute parental veto).

⁷ See WARREN FREEDMAN, *LEGAL ISSUES IN BIOTECHNOLOGY AND HUMAN REPRODUCTION* 123-24 (1991) (stating that anti-abortion forces waged war against right to abortion immediately after *Roe v. Wade*); RODMAN & SARVIS, *supra* note 3, at 66 (pointing to rejection of legal abortion by Catholic hierarchy); Lawrence M. Friedman, *The Conflict Over Constitutional Legitimacy*, in *THE ABORTION DISPUTE AND THE AMERICAN SYSTEM* 13, 23 (1983) (acknowledging great controversial response to *Roe*). But see CONDIT, *supra* note 1, at 147-49 (public opinion polls indicate little change in abortion beliefs).

⁸ See TRIBE, *supra* note 1, at 14-21 (making note of Supreme Court's reaffirmation of *Roe v. Wade* despite "a gradually growing number of dissents" and increasingly conservative

however, have demonstrated the Court's increased willingness to allow legislators to restrict a woman's right of abortion, thereby limiting the application of *Roe*.⁹

This Note will discuss developments in the law following *Roe v. Wade* which abridge the right of abortion. Part One will analyze Supreme Court decisions regarding state and federal abortion funding, including the most recent case which conditioned federal funds on the restriction of free speech in family planning clinics nationwide. Part Two will address the Court's leniency toward state restrictions on abortion and will review current state abortion laws which pose challenges to *Roe*. Finally, Part Three will examine the theories of judicial decision-making regarding abor-

court); Thomas J. Marzen & Victor G. Rosenblum, *Strategies for Reversing Roe v. Wade Through the Courts*, in *ABORTION AND THE CONSTITUTION* 195, 195-97 (1987) (discrediting legal theory of *Roe* with Supreme Court faction and postulating strategy for its reversal); Chopko & Alvare, *supra* note 6, at 116 n.10. The authors typify the Supreme Court as sharply and irrevocably divided on abortion as evidenced by a pattern of diminishing majorities, i.e., from seven-to-two in *Roe v. Wade*, 410 U.S. 113 (1973), to six-to-three in *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983), to five-to-four in *Thornburgh*, 476 U.S. 747. *Id.*; see also Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379, 379 (1991). In noting a "dramatic shift in constitutional adjudication" by the Supreme Court in areas of abortion, affirmative action, civil rights, capital punishment and the like, the author credits the shift to authoritarianism, and not to conservatism. *Id.* Conservatism implies "a sense of caution or a respect for tradition that is not absolute or inflexible." *Id.* Authoritarianism "represents inflexibility and oppression." *Id.* at 379-80. It insists on obedience and conformity and will utilize coercion and punishment to ensure that obedience. *Id.* at 382. It is a threat to "human freedom and dignity." *Id.* at 379; see Marcia Coyle, *The New Term*, NAT'L L.J., Oct. 7, 1991, at 1 (anticipating unpredictability of "rapidly changing" Supreme Court on constitutional issues); David G. Savage, *The Rehnquist Court; Bill Rehnquist was Once an Extremist. Now His Views Almost Always Become the Law of the Land*, L.A. TIMES, Sept. 29, 1991, at 12 (depicting Chief Justice Rehnquist as unflinchingly conservative with control of Court and commitment to rewriting constitutional law).

⁹ See, e.g., *Rust v. Sullivan*, 111 S. Ct. 1759, 1778 (1991) (upholding use of federal funds for range of family planning services except abortion counseling); *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2944 (1990) (allowing 48-hour waiting period between notification of minor's parents and performance of abortion); *Webster v. Reproductive Health Services*, 492 U.S. 490, 521 (1989) (upholding significantly restrictive state regulation of abortion); *H.L. v. Matheson*, 450 U.S. 398, 413 (1981) (requiring physician to notify parents of minor dependant with no showing of maturity or emancipation); *Harris v. McRae*, 448 U.S. 297, 325 (1980) (permitting state governmental regulations withholding Medicaid funds for certain medically necessary abortions); *Poelker v. Doe*, 432 U.S. 519, 521 (1977) (allowing publicly financed hospital services for childbirth without similar services for abortions not necessary to save woman's life); *Maher v. Roe*, 432 U.S. 464, 478-80 (1977) (upholding welfare regulations that fund childbirth but not abortions unless physician determines abortion to be medically necessary). See generally Vivian Berger, *Civil Liberties in the Next Century*, 63 N.Y. ST. B.J. 46 (1991) (referring to routine rejection of civil liberties cases by Supreme Court majority).

tion and will argue that the Court is not adhering to *Roe v. Wade* but is implicitly overruling it, in order to return the abortion issue to the states.

I. THE ABORTION FUNDING ARENA

A. *The State Approach: Promoting Childbirth*

The Supreme Court has given both Congress and the state legislatures substantial discretion in advancing alternatives to abortion.¹⁰ In *Maher v. Roe*,¹¹ two indigent women challenged the validity of a Connecticut welfare regulation which granted Medicaid benefits only for the performance of "medically necessary" abortions.¹² The Court concluded that a state could refuse to pay for nontherapeutic abortions for indigent women, even though its Medicaid program reimbursed women for expenses associated with childbirth.¹³ In addressing what *Roe v. Wade* defined as a fundamental right of abortion, the majority determined that the state could promote childbirth as a more attractive alternative to abortion through the use of state funding.¹⁴ The Court emphasized that this decision was not a retreat from *Roe*, since the regulation placed no obstacle, "absolute or otherwise," in an indigent woman's path toward obtaining an abortion.¹⁵

Three years later, the Supreme Court applied the *Maher* funding rationale in *Harris v. McRae*.¹⁶ In *Harris*, a group of indigent

¹⁰ See, e.g., *Rust*, 111 S. Ct. at 1778 (upholding use of federal funds for full range of family planning services while prohibiting funds for abortion); *Harris*, 448 U.S. at 325 (allowing state to withhold funding for certain medically necessary abortions); *Maher*, 432 U.S. at 478-80 (1977) (permitting state to refuse to fund nontherapeutic abortions). See generally Theodore C. Hirt, *Why the Government is not Required to Subsidize Abortion Counseling and Referral*, 101 HARV. L. REV. 1895, 1898-1901 (1988) (supporting Supreme Court's decisions to allow governmental nonfunding of abortions).

¹¹ 432 U.S. 464 (1977).

¹² *Id.* at 466-67.

¹³ *Id.* at 474.

¹⁴ *Id.*

¹⁵ *Id.*; see Laura C. Sloan, Comment, *Constitutional Law—State Impediments to Abortion Funding*—National Educ. Ass'n of R.I. v. Garrahy, 34 KAN. L. REV. 387 (1985). "[T]he Court distinguished between the state's creation of an obstacle to abortion and the state's refusal to remove an existing obstacle. The former is an impermissible burden on a woman's right of privacy, while the latter is constitutionally permissible." *Id.* at 387.

¹⁶ 448 U.S. 297 (1980); see Catherine Hebert, *Prohibition of Public Funding for Abortion Counseling: Government Violation of Women's Constitutional Right of Privacy*, 17 HASTINGS CONST. L.Q. 421, 432 (1990) (stating court followed reasoning of *Maher*).

women challenged the Hyde Amendment to the Medicaid program, which allowed states to withhold funds for certain medically necessary abortions, because federal reimbursement was not available for such procedures.¹⁷ The Secretary of Health, Education and Welfare, charged with overseeing the Medicaid program, asserted that the denial of funding supported the state's interest in protecting the health of the mother,¹⁸ as recognized in *Roe*.¹⁹ Relying on *Maher*, the Court concluded that the only obstacle restricting a pregnant woman's right to exercise her freedom of choice was indigency, and that the state had no duty to remove that obstacle.²⁰ Thus, the foregoing indicates that *Maher* and *Harris* have affirmed the states' definitive right to fund programs favoring childbirth over abortion, with the practical result of barring indigent women from exercising their right to choose abortion.²¹

¹⁷ *Harris*, 448 U.S. at 297. The Hyde Amendment was a congressional restriction on the use of federal Medicaid funds to reimburse the cost of abortions, except in situations where the life of the mother was threatened or the pregnancy resulted from rape or incest which had been reported promptly to a law enforcement or public health agency. *Id.*

¹⁸ *Id.* at 313.

¹⁹ *Id.*; see *supra* notes 3-4 and accompanying text (illustrating how fundamental protection and trimester framework set forth in *Roe* restricted scope of state regulations to those concerning maternal health).

²⁰ *Harris*, 448 U.S. at 316. "[F]inancial constraints that restrict an indigent woman's . . . freedom of choice are the product not of governmental restrictions on access to abortions, but rather of indigency." *Id.*

²¹ See Hirt, *supra* note 10, at 1899 (stating that *Maher* and *Harris* will lead to fewer abortions). There are predictions of a more securely entrenched "two-tiered health-care system: one that provides affluent women with the full range of options and offers poor women either skewed information or a range of services severely constrained by funding limitations." *Id.* at 1899; see also *Clinics Vow to Forgo Funds, Keep Abortion Counseling*, BOSTON GLOBE, June 24, 1991, National/Foreign, at 1 [hereinafter *Clinics Vow*]. The Alan Guttmacher Institute conducted a study of Title X patients and reported that 3.7 million women a year use federally funded family planning clinics. Of these:

83 percent use them as their only source of pregnancy planning

29 percent are under twenty years old

27 percent are black and 11 percent Hispanic

31 percent have incomes below the federal poverty level

16 percent have diabetes, hypertension or other health problems that make pregnancy dangerous

Without the subsidized clinics, there would be an extra 509,000 unintended births a year and 516,000 abortions.

Id. at 6; Jane Smolowe, *Gagging the Clinics: The Justices Did Not Disturb the Constitutional Right to an Abortion but Made It Illegal to Discuss the Procedure in Federally Funded Clinics*, TIME, June 3, 1991, at 16. Dr. Allan Rosenfield, dean of Columbia University School of Public Health and professor of public health and obstetrics, said that *Rust* could lead to

Roe v. Wade and its progeny constructed a fundamental right of abortion²² and confined state regulation to matters of maternal health, prenatal life, and medical standards.²³ The Supreme Court in *Maher* and *Harris* placed additional limitations on that right by allowing states to exercise considerable power in curtailing the availability of abortions through the allocation of funds.²⁴ Thus, in balancing the competing values of the individual's right of abortion with the states' interests, it is suggested that the Court has endowed the states with a regulatory power which effectively diminishes that fundamental right. It is further submitted that the state funding cases of *Maher* and *Harris* sanctioned the conditioning of federal funds on the prohibition of abortion-related services in clinics nationwide.

"limited services and more abortions and high-risk pregnancies due to more difficulty getting access to prenatal care." *Some Clinics Plan to Advise and Forgo Aid*, N.Y. TIMES, May 24, 1991, at A5 [hereinafter *Some Clinics*].

²² See *Rust v. Sullivan*, 111 S. Ct. 1759, 1778 (1991) (Blackmun, J., dissenting) (stating that *Roe* and its progeny concern fundamental right to self-determination); Crain, *supra* note 6, at 263 and accompanying cases (discussing *Roe* and its progeny); Andrea M. Sharin, Note, *Potential Fathers and Abortion: A Woman's Womb Is Not a Man's Castle*, 55 BROOK. L. REV. 1359, 1359 (1990). "The Supreme Court has reaffirmed that *Roe* and its progeny clearly establish that an adult woman has an untrammelled constitutional right to choose an abortion in the first trimester." *Id.*; see also *Harris*, 448 U.S. at 329-30 (Brennan, J., dissenting) (reaffirming that *Roe* and its progeny established women's freedom from state interference with her reproductive choice); Paul S. Grobman, Comment, *The Constitutionality of Statutorily Restricting Public Access to Judicial Proceedings: The Case of the Rape Shield Mandatory Closure Provision*, 66 B.U. L. REV. 271, 303 (1986) (asserting that *Roe* and its progeny represent freedom from governmental interference with respect to this private and individual decision); cf. Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Analyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 949 (1988) (noting compelling state interest in protecting potential life in final months of pregnancy as established by *Roe* and its progeny).

²³ See *Roe*, 410 U.S. at 155, 164-65 (stating that these maternal health, prenatal life and medical standards are values which state has great interest in safeguarding and are calculated into trimester schedule of pregnancy); *Thornburgh*, 476 U.S. at 797 (Stevens, J., concurring). Justice Stevens noted that *Roe* and its progeny created a national right of abortion because "the legitimate goals that may be served by state coercion of private choices regarding abortion are, at least under some circumstances, outweighed by the damage to individual autonomy and privacy that such coercion entails." *Id.* But see *Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682, 688 (3d Cir. 1991). "Justice O'Connor has referred to abortion as a 'limited' fundamental right." *Id.* (citing *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting)).

²⁴ See *Hirt*, *supra* note 10, at 1900 (postulating that decisions in *Maher* and *Harris* should insulate government abortion funding activities from extensive judicial review).

B. The Federal Philosophy: Rust v. Sullivan and the Gag Rule

Recently, in *Rust v. Sullivan*,²⁶ the Supreme Court allowed the federal government to further restrict a woman's right of abortion²⁶ through its formidable spending power.²⁷

In 1970, Congress enacted Title X of the Public Health Service Act which provided federal funding to clinics offering a broad range of family planning services.²⁸ Section 1008 of the Act specified that Title X funds were not to be used in clinics where abortion was offered as a method of family planning.²⁹ After *Roe v. Wade*, Title X providers had been permitted to provide their patients with nondirective counseling and referral for abortions.³⁰ However, in 1988, the Secretary of the Department of Health and Human Services ("HHS") promulgated new regulations that unequivocally prohibited Title X clinics from engaging in abortion counseling, referral, or advocacy.³¹

²⁶ 111 S. Ct. 1759 (1991).

²⁸ See Statutory Prohibition on the Use of Appropriated Funds Where Abortion is a Method of Family Planning, 53 Fed. Reg. 2922-46 (1988) (codified at 42 C.F.R. §§ 59.1-215).

²⁷ See BUDGET OF THE U.S. GOVERNMENT, Fiscal Year 1990, Table 24, at 10-45 (1989) (federal expenditures for fiscal year 1990 were approximately \$1.152 billion); Steven V. Roberts, *U.S. Proposes Curb on Clinics Giving Abortion Advice*, N.Y. TIMES, July 31, 1987, at A1 (quoting \$142.5 million for family planning services, fiscal year 1988).

²⁸ See Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1504 (codified as amended at 42 U.S.C. §§ 300 - 300a-6 (1988)).

²⁹ See *supra* note 26 (setting forth regulation which denies federal funds for abortion counseling or services).

³⁰ See *Program Guidelines for Project Grants for Family Planning Services*, Public Health Service of HHS, 1981, at 12-13 (requiring Title X projects to provide information on all options of family planning).

³¹ See Grants for Family Planning Services, 42 C.F.R. §§ 59.7-10 (1988). The most relevant regulations state in pertinent part that:

59.8(a)(1) A Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.

59.8(a)(2) Because Title X funds are intended only for family planning, once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of the mother and unborn child. She must also be provided with information necessary to protect the health of the mother and unborn child until such time as the referral appointment is kept

59.8(a)(3) A Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abor-

Before the new regulations were applied, Title X health care providers brought suit against the Secretary of HHS on behalf of themselves and their patients.³² The suit alleged that the regulations were not authorized by Title X³³ and that they violated the First and Fifth Amendments.³⁴ The federal district court rejected

tions, by excluding available providers who do not provide abortions, or by "steering" clients to providers who offer abortion as a method of family planning.

59.10(a) A Title X project may not encourage, promote or advocate abortion as a method of family planning. This requirement prohibits actions to assist women to obtain abortions or increase the availability or accessibility of abortion for family planning purposes. Prohibited actions include the use of Title X project funds for the following:

(5) Developing or disseminating in any way materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning.

Id.

³² See *Rust v. Sullivan*, 111 S. Ct. 1759, 1759 (1991).

³³ See *id.* at 1766; 42 C.F.R. §§ 59.7-10 (1990); *Planned Parenthood Fed'n of Am. v. Sullivan*, 913 F.2d 1492, 1496 (10th Cir. 1990) (noting that administrative interpretation has been consistent since enactment of Title X), *vacated*, 111 S. Ct. 2252 (1991); *Massachusetts v. Secretary of Health and Human Servs.*, 899 F.2d 53, 56 (1st Cir. 1990) (acknowledging new regulations significantly alter previous agency interpretation), *vacated*, 111 S. Ct. 2252 (1991); 120 CONG. REC. 21,687-21,695 (1974) (striking down amendment that would have barred funds for abortion referral); 121 CONG. REC. 20,863-65 (1975) (voting against amendment restricting promotion of abortion); 124 CONG. REC. 37,045 (1978) (rejecting amendment identical to 1988 regulations); Letter from Carol C. Conrad, Office of the General Counsel, U.S. Dept. of Health, Education, and Welfare, to Elsie Sullivan, Assistant for Information and Education, Office for Family Planning, Bureau of Community Health Serv. (Apr. 14, 1978) (stating current nondirective policy of referral or information concerning abortion services is not considered to be proscribed by Title X); *cf.* *Bob Jones Univ. v. United States*, 461 U.S. 574, 599-601 (1983) (indicating that congressional inaction regarding highly debated social issues depicts acceptance of existing administrative interpretations); *Merrill Lynch Pierce Fenner & Smith v. Curran*, 456 U.S. 353, 402 (1982) (Powell, J., dissenting) ("legislative inaction should achieve the force of law"); C. Andrew McCarthy, Comment, *The Prohibition on Abortion Counseling and Referral in Federally-Funded Family Planning Clinics*, 77 CALIF. L. REV. 1181, 1184 (1989) (asserting that 1970 Title X amendment was an interpretation to which Congress apparently acquiesced). See generally *State v. Sullivan*, 889 F.2d 401, 418 (2d Cir. 1989) (Kearse, J., dissenting) (recounting how Secretary admitted 1988 regulations were result of shift in political climate), *aff'd*, *Rust v. Sullivan*, 111 S. Ct. 1759 (1991); *Reagan Vows "Our Best" to Abortion Foes*, L.A. TIMES, Jan. 22, 1988, § 1, at 1 (showing introduction of new regulations in politically charged presidential speech asking for pro-life support).

³⁴ *Rust*, 111 S. Ct. at 1766; see U.S. CONST. amend I. The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech" *Id.*; U.S. CONST. amend V. The Fifth Amendment provides in pertinent part that "[n]o person shall . . . be deprived of life, liberty or property without due process of law" *Id.* Challenges have been made under the Fourteenth Amendment as well. See *Williams v. Zbarez*, 448 U.S. 358 (1980). This case brought a Fourteenth Amendment challenge against a state program that only paid for abortions which were necessary to save the life of the mother. *Id.* at 361. Petitioners claimed that public funding of medically necessary ser-

the petitioners' claims and granted summary judgment in favor of the Secretary.³⁵ Although the Second Circuit upheld the regulations,³⁶ a split developed among the circuit courts when the First and Tenth Circuits invalidated the regulations.³⁷ The Supreme Court granted certiorari to resolve this issue.³⁸

Affirming the Second Circuit's holding, the Court determined that the regulations were within the constructive scope of the Secretary's authority³⁹ and that their implementation would not prevent women from exercising their abortion right.⁴⁰ The majority found that both the legislative history and the language of Title X

vices, but not medically necessary abortions, were a violation of the Equal Protection Clause. *Id.* The Court, however, held that such funding programs did not violate the Fourteenth Amendment. *Id.* at 369; *D R v. Mitchell*, 645 F.2d 852, 853 (10th Cir. 1981) (holding that Utah statute denying funds for abortion unless necessary to save mother's life does not violate Fourteenth Amendment); *cf.* Ruth Colker, *Feminism, Theology and Abortion: Toward Love, Compassion and Wisdom*, 77 CAL. L. REV. 1011, 1046 (1989) (criticizing unwillingness to provide public funding for abortions for indigent women even when pregnancy substantially threatens health or well being).

³⁵ See *State v. Bowen*, 690 F. Supp. 1261, 1265 (S.D.N.Y. 1988), *aff'd*, 889 F.2d 401 (2d Cir. 1989), *aff'd sub nom.* *Rust v. Sullivan*, 111 S. Ct. 1759 (1991). The district court decision was based solely on the premise that "[t]he regulations do not prohibit or compel speech. They grant money to support one view and not another; but that is quite different from infringing on free speech." *Bowen*, 690 F. Supp. at 1274. The court incorrectly used *FCC v. League of Women Voters*, 468 U.S. 364 (1984) as precedent. *Bowen*, 690 F. Supp. at 1273. The *Bowen* court wrote that "neither Congress nor any agency is entirely 'without power to regulate' content, timing and character of speech." *Id.* The court's reliance on *League of Women Voters* was misleading because in that case a provision of the Public Broadcasting Act of 1967 was struck down for prohibiting stations that receive federal funds from editorializing. *League of Women Voters*, 468 U.S. at 400-01. The *Bowen* court attempted to avoid the outcome of *League of Women Voters* by trivializing First Amendment protection of the right to receive abortion information in comparison with "important journalistic freedoms." *Bowen*, 690 F. Supp. at 1273-74.

³⁶ See *State v. Sullivan*, 889 F.2d 401, 407-10 (2d Cir. 1989), *aff'd sub nom.* *Rust v. Sullivan*, 111 S. Ct. 1759 (1991). The *Sullivan* court relied on the case of *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984) to decide the statutory construction issue. *Sullivan*, 889 F.2d at 409. The Court in *Chevron* stated that when a statute is ambiguous the agency's construction must be accorded substantial deference as the interpretation of the agency charged with administering the statute, and may not be disturbed as an abuse of discretion if it reflects a plausible construction of the statute's plain language and does not otherwise conflict with Congress' expressed intent. *Chevron*, 467 U.S. at 844.

³⁷ See *Massachusetts v. Secretary of Health and Human and Servs.*, 899 F.2d 53, 71 (1st Cir. 1990) (en banc), *vacated*, 111 S. Ct. 2252 (1991) (striking down program integrity provision of 1988 regulations as violative of congressional intent); *Planned Parenthood Fed'n of America v. Sullivan*, 913 F.2d 1492, 1495 (10th Cir. 1990) (relying on First Circuit), *vacated*, 111 S. Ct. 2252 (1991).

³⁸ See *Rust v. Sullivan*, 111 S. Ct. 1759, 1764 (1991).

³⁹ *Id.* at 1767-69.

⁴⁰ *Id.* at 1776-78.

were ambiguous,⁴¹ and the Secretary's interpretation was a permissible construction of the plain language of the statute.⁴² Addressing the constitutional issues, the Court stated that the free speech rights of Title X health care providers had not been abridged⁴³ because the providers were free to engage in abortion-related speech outside of the federally funded program.⁴⁴ In addition, the majority held that the regulations did not violate a woman's Fifth Amendment right to choose whether to terminate her pregnancy,⁴⁵ reiterating the well-established rule that the government has no duty to fund every constitutionally protected activity and can choose to favor one activity to the exclusion of others.⁴⁶

Writing for the dissent, Justice Blackmun, who authored *Roe v. Wade*, asserted that the majority opinion had sidestepped several major issues.⁴⁷ He argued that the decision allowed the govern-

⁴¹ *Id.* at 1767-68. "[W]e agree with every court to have addressed the issue that the language is ambiguous '[T]he question for the court is whether the agency's answer is based on a permissible construction of the statute.'" *Id.* at 1767 (quoting *Chevron v. Nat. Resources Def. Council*, 467 U.S. 837, 842-43 (1984)). The Court also found the legislative history to be ambiguous since Congress had never directly addressed the issue of abortion counseling. *Id.*

⁴² See *Rust*, 111 S. Ct. at 1769. The Court held that when the legislative history and language of a statute are unclear, it is customary to defer to agency interpretation. *Id.* at 1769; cf. *Planned Parenthood Fed'n of Am. v. Sullivan*, 913 F.2d 1492, 1497 (10th Cir. 1990) (granting deference to agency's interpretation although regulations were inconsistent with congressional intent), *vacated*, 111 S. Ct. 2252 (1991); *Massachusetts v. Secretary of HHS*, 899 F.2d 53, 58 (1st Cir. 1990) (en banc), *vacated*, 111 S. Ct. 2252 (1991) (giving deference to regulations despite concerns of shifting 17 year-old policy).

⁴³ See *Rust*, 111 S. Ct. at 1776. The Court asserts that the regulations do not force a doctor "to represent as his own any opinion that he does not in fact hold." *Id.* Since the program does not provide medical care after conception, "a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her." *Id.* *Contra Sullivan*, 913 F.2d at 1503 (placing limitation on physicians' communication violates their constitutional rights); *Secretary of HHS*, 899 F.2d at 73 (Court held that regulations infringe upon protections found in First Amendment); see also Carole I. Chervin, Note, *The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights?*, 41 STAN. L. REV. 401, 410-22 (1989) (surveying recent decisions in which gag rule would be found unconstitutional).

⁴⁴ *Rust*, 111 S. Ct. at 1775.

⁴⁵ *Id.* at 1777 (quoting *Harris v. McRae*, 488 U.S. 297, 317 (1980)).

⁴⁶ *Rust*, 111 S. Ct. at 1776 (quoting *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 196 (1989)); see *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982). "[A] State is under no constitutional duty to provide substantive services for those within its border." *Id.*; *McRae*, 488 U.S. at 317-18 (asserting that states have no obligation to fund abortions); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (expressing that state has no constitutional duty to provide housing).

⁴⁷ See *Rust*, 111 S. Ct. at 1778-79 (1991) (Blackmun, J., dissenting). Justice Blackmun questioned how content-based restrictions on speech, imposed by regulations in a congress-

ment to enforce an unconstitutional condition⁴⁸ of silence upon Title X providers, while surreptitiously limiting the right of abortion for indigent women by coercing them to follow through with childbirth.⁴⁹ Justice Blackmun concluded that the majority "[i]n its haste further to restrict the right of every woman to control her reproductive freedom . . . disregards established principles of law and contorts this Court's decided cases to arrive at its pre-ordained result."⁵⁰

1. Conditions on Funding: Penalizing Abortion by Restricting Free Speech

In *Maher v. Roe*, the Supreme Court allowed states to favor childbirth through the allocation of funds.⁵¹ The states, however, were not permitted to advance their interest in promoting child-

sional act could not implicate core constitutional questions. *Id.*

⁴⁸ *Id.* at 1782; see *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), *overruled by* *Rust v. Sullivan*, 111 S. Ct. 1759 (1991). Justice Stewart stated that no persons have rights to valuable government benefits, thus benefits may be denied for numerous reasons. *Id.* However, the government may not deny a benefit on the "basis that [it] infringes [upon a] constitutionally protected interest—especially . . . freedom of speech." *Id.*; *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (holding employment in public school system may not be conditioned upon suspension of teacher's First Amendment rights); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (conditioning teaching position on non-Communist activity is unconstitutional); see also Edward G. Reitler, *The Title X Family Planning Subsidies: Government's Role in Moral Issues*, 27 HARV. J. ON LEGIS. 453, 464 (1990) (discussing unconstitutional conditions doctrine and *Sindermann* decision); David M. Schoeggl, *New Life for the Doctrine of Unconstitutional Conditions?*, 58 WASH. L. REV. 679, 682-84 (1983). At the inception of the unconstitutional conditions theory, "rights" protected by the Constitution and "privileges" dictated by the legislature were distinguished. *Id.* It was asserted that rights could never be conditioned, whereas privileges could be conditioned, because the recipient had only to refuse the funds to retain his rights. *Id.*

⁴⁹ See *Rust*, 111 S. Ct. at 1785 (Blackmun, J., dissenting). Justice Blackmun observed that the indigent women whom Title X serves would follow the "perceived advice" of their physicians, not knowing the physicians' speech was strictly controlled by government regulations. *Id.* Moreover, the vast majority of these women, relying on this advice, would "carry their pregnancy to term, despite their needs to the contrary and despite the safety of the abortion procedure . . ." *Id.*

⁵⁰ *Id.* at 1786; see *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 546 (1989) (Blackmun, J., dissenting). Justice Blackmun first charged the plurality with masquerading their reasoning, stating their intent was quite clearly "not to persuade, but to prevail." *Id.* (Blackmun, J., dissenting). See generally Christopher C. Kendall, Comment, *New York v. Sullivan: SHHH . . . Don't Say the "A" Word! Another Outcome Oriented Abortion Decision*, 23 J. MARSHALL L. REV. 753, 758-64 (1990) (dissecting subjective reasoning of lower court which Supreme Court later followed).

⁵¹ See *Maher v. Roe*, 432 U.S. 464, 474 (1973); see also *supra* notes 11-15 and accompanying text (discussing *Maher* funding rationale).

birth over a woman's right to abortion through the restriction of free speech.⁶² It is submitted that the 1988 regulations inhibit the free speech of Title X providers and patients by imposing unconstitutional conditions upon the receipt of federal funds.⁶³

Conditional federal funding requires both content and viewpoint neutrality with respect to the speech involved.⁶⁴ Until *Rust*, the Supreme Court had never upheld the conditioning of public funds on the suppression of viewpoint-based speech.⁶⁵ Suppression of speech based on content or viewpoint is the purest example of a "law . . . abridging the freedom of speech"⁶⁶ The *Rust* decision allows the federal government to restrict free speech because of its abortion viewpoint.⁶⁷ It is submitted that the prohibition of encouraging, promoting or advocating abortion as a

⁶² See, e.g., *Texas v. Johnson*, 491 U.S. 397, 413 (1989) (holding that statute cannot prohibit flag burning because society finds it disagreeable); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 233 (1987) (holding statute unconstitutional which taxed magazines based on content), *overruled by Rust v. Sullivan*, 111 S. Ct. 1759 (1991); *FCC v. League of Women Voters*, 468 U.S. 364, 402 (1984) (striking down ban on editorializing by publicly funded radio stations), *overruled by Rust v. Sullivan*, 111 S. Ct. 1759 (1991); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (stating government has no power to restrict expression because of content); Chervin, *supra* note 43, at 417 (stating governmental standards for receipt of funds cannot be content or viewpoint based). *But see* *Kinsey v. Salado Independent School Dist.*, 950 F.2d 988, 992-96 (5th Cir. 1992) (denying free speech violation in employment termination); *cf. Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 550-51 (1983) (upholding regulations refusing tax deductions for all non-profit organizations engaged in lobbying).

⁶³ See *Rust*, 111 S. Ct. at 1779 (Blackmun, J., dissenting).

⁶⁴ See Chervin, *supra* note 43, at 422. Funds cannot be conditioned upon content or viewpoint of speech. *Id.* Content-based speech, which forbids discussion about prayer in schools, is distinguishable from viewpoint-based speech, which forbids discussion that *advocates* prayer in schools. *Id.* at 416 n.88.

⁶⁵ See *Rust*, 111 S. Ct. at 1780 (Blackmun, J., dissenting). *But see* Reitler, *supra* note 48, at 457 (stating that federal regulation of speech through subsidies is not new approach).

⁶⁶ *Rust*, 111 S. Ct. at 1780 (citing *League of Women Voters*, 468 U.S. at 383-84, quoting *Consolidated Edison Co. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 546 (1980)); see *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.31 (1978). Government may not become the final judge of the relative merits of conflicting arguments. *Id.*; Anthony J. Colletta, *Abridgements of Free Speech Which Discriminate on the Basis of Viewpoint*: *Finzer v. Barry*, 61 ST. JOHN'S L. REV. 127, 131-33 (1986) (addressing viewpoint discrimination against disagreeable but peaceful expressions); McCarthy, *supra* note 33, at 1197 (quoting Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 199 (1983)). "Government attempts substantially to eliminate particular ideas, viewpoints, or items of information from public debate . . . undermine the values and purposes underlying the [F]irst [A]mendment." *Id.* *But see* Reitler, *supra* note 48, at 456-57 (concluding that Title X is not an unconstitutional infringement on First Amendment rights).

⁶⁷ See Chervin, *supra* note 43, at 410-22 (discussing how free speech is infringed upon by Gag Rule).

method of family planning is explicitly viewpoint-based, since the regulations restrain only pro-choice, not pro-life or anti-abortion sentiment. Although the government cannot directly prohibit abortions or control speech, the government has indirectly discriminated against indigent women by denying them counseling on abortion.⁵⁸ As a result, Title X providers are indirectly "gagged"⁵⁹ and must waive their First Amendment rights as a condition to the receipt of federal funds needed to keep their institutions operating.⁶⁰

⁵⁸ See S. REP. NO. 1472, 91st Cong., 2d Sess. 1, *reprinted in* 1970 U.S.C.C.A.N. 5068, 5070 (indicating that Title X program targeted to low-income and indigent persons, and information regarding pregnancy was to be made widely available); *see also* *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (indirect deterrence as effective as direct deterrence); Chervin, *supra* note 43, at 424 (right to abortion free of governmental influence should be as viable for indigent client as for one who pays).

⁵⁹ See Chervin, *supra* note 43, at 403-04, 410-14 (analyzing prohibition of abortion speech).

⁶⁰ See *Rust*, 111 S. Ct. at 1781-84 (Blackmun, J., dissenting) (explaining how Title X regulations violate First Amendment freedoms by withholding funds as penalty for discussing abortion); *cf.* *Reitler*, *supra* note 48, at 495 (concluding that "Title X Regulations are constitutional exercises of government speech by subsidy").

Michael Astrue, general counsel for the Department of HHS, said that "[t]he clinics have had several year's warning" and if they will not follow the rules, then the money will be offered to others who will. *See Some Clinics*, *supra* note 21. Considering that Title X provided \$144 million to projects this year, it is likely that many clinics will accept these funds even under such restrictions. *But see Clinics Vow*, *supra* note 21. Yet, many are pledging to give up federal funding rather than submit. *Id.* Judith Desarno, "head of the National Family Planning and Reproductive Health Association, which represents more than 90% of the clinics," stated that "[i]f in fact people can't find a way to do on-site counseling, they will turn the money back" *Id.* Planned Parenthood of New York City is determined to return the \$423,000 a year it receives under Title X, a 25% cut of its overall budget, according to the group's president, Alexander Sanger. *Id.* Planned Parenthood in New Hampshire, Vermont, Maine and Connecticut will follow suit. *Id.*

David Hass, president of the Board of Directors of Planned Parenthood of Wisconsin also vows to forgo the \$225,000 of its \$11 million budget even though it will mean closing clinics. Linda Feldmann, *U.S. Abortion Clinics Await Policy Signal by Congress*, CHRISTIAN SCI. MONITOR, June 18, 1991, (The U.S.), at 7 [hereinafter *Abortion Clinics Await*]. Jill June, President of Planned Parenthood of Greater Iowa, said, "[w]omen and their rights and our principles are not for sale, so we will do without the money rather than comply." *Some Clinics*, *supra* note 21, at 5. The Iowa Planned Parenthood provides services to eighty-seven rural counties in that state and receives \$500,000 a year, 10% of its annual budget. *Id.* In all, Planned Parenthood will forgo more than \$30 million a year in federal funds. *Id.* Directors of other federally financed clinics from Vermont to California similarly condemned the ruling. *Id.* Dr. Allan Rosenfield, dean of Columbia University School of Public Health and professor of public health and obstetrics stated that this was "an absolutely unacceptable intrusion into my practice of medicine . . . I would be practicing malpractice. Patients would have the right to sue." *Id.*

Some Title X projects have tried inventive strategies to deal with these restrictions: clinics already functioning under the Title X regulations have managed to keep their subsidies

As a result, indigent women and Title X providers who have accepted and relied on the pre-1988 regulations and federal support for nearly two decades,⁶¹ would be substantially penalized by the withdrawal of such funds, leaving them in a worse position than if the subsidies had never been created.⁶²

Although the Supreme Court has approved conditions on public funding in the past,⁶³ any attempt to condition funds which would infringe upon a constitutional right such as free speech, must be narrowly tailored to promote a specific public interest.⁶⁴ No legiti-

while providing abortion services by having counselors whose salaries are not paid by Title X make referrals. *Abortion Clinics Await*, *supra*, at 7. Thomas C. Kring, executive director of the Los Angeles Regional and Family Planning Council and the California Family Planning Council, which together distribute \$13.5 million in federal funds to 200 clinics, has had the clinics continue their ordinary practice. *Some Clinics*, *supra* note 21, at 5. Kring's noncompliance is due to the \$36 million they receive from state family planning funds, which is contingent upon providing counseling for all options as mandated by state law. *Id.* It may require the Councils to separate state and federal funds or decline federal funds altogether. *Id.* Assemblywoman Maureen Ogden (R-Union) hopes to introduce legislation providing up to \$3.9 million annually in state funding for clinics that lose Title X funds. *Proposed Legislation Would Aid New Jersey Family Planning Clinics*, PROPRIETARY TO THE UNITED PRESS INT'L 1991, May 29, 1991 (Regional News). Alexander Sanger, President and CEO of Planned Parenthood of New York City, reported \$85,000 in private donations as of early June. *Abortion Clinics Await*, *supra*, at 7.

⁶¹ See *Massachusetts v. Secretary of Health and Human Servs.*, 899 F.2d 53, 73 n.11 (1st Cir. 1990), *vacated*, 111 S. Ct. 2252 (1991) (Title X funds constituted approximately 50 percent of operational budget for most clinics).

⁶² See Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1359-62 (1984). Grantees who no longer receive federal subsidies would be moved below a 'natural baseline,' the position enjoyed in the normal course of events. *Id.* "Losing a benefit previously provided [differs] from simply never having been provided the benefit in the first place." *Id.* at 1359.

⁶³ See, e.g., *Lyng v. International Union, UAW*, 485 U.S. 360, 364-69 (1988) (provision of Food Stamp Act denying benefits to members of union on strike does not violate First Amendment); *Grove City College v. Bell*, 465 U.S. 555, 573-74 (1984) (conditioning of federal funding of college upon compliance with Title IX regulation prohibiting sex-based discrimination is constitutional); *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 142-43 (1947) (restricting political activities of state employees who are paid through federal grants); *DKT Memorial Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 299 (D.C. Cir. 1989) (upholding government's right to deny aid to private groups supporting abortion in foreign countries).

⁶⁴ See *Simon & Schuster, Inc. v. Members of the N.Y.S. Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991) (reiterating that regulations on First Amendment freedom of speech must be narrowly tailored to advance interest asserted by state); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987), *overruled by Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (state must narrowly draw statute and prove compelling state interest for content-based taxation of magazines); Alexandra A.E. Shapiro, *Title X, The Abortion Debate and the First Amendment*, 90 COL. L. REV. 1737, 1748 (1990) (asserting that conditions for funding must be narrowly tailored to compelling public interest); cf. David M. Schoeggl, *New Life for the Doctrine of Unconstitutional Conditions?*, 58 WASH. L. REV. 679, 697 (1983) (favoring Supreme

mate public interest has been advanced by the 1988 regulations,⁶⁵ and the effect of these regulations has been to impose an all-encompassing "gag rule" on a provider's ability to counsel patients.⁶⁶ It is therefore suggested that although the government may have a compelling interest that would warrant prohibiting abortion, it cannot justify prohibiting speech concerning abortion.

2. Restricted Information: Restricted Freedom of Choice

Roe v. Wade established a woman's right to be free from governmental interference with her reproductive decision.⁶⁷ The purpose and result of the 1988 regulations are to impair the intelligence and independence of that decision.⁶⁸ Governmental programs are a vital source of information, especially for the indigent women of this country.⁶⁹ However, since 1988, Title X pro-

Court's equal protection analysis on funding abortions over California's use of unconstitutional conditions doctrine).

⁶⁵ *Secretary of HHS*, 899 F.2d at 68 (stating lack of evidence that regulations advance any interest in public health).

⁶⁶ See Chervin, *supra* note 43, at 401 (demonstrating how regulations suppress health providers' speech); see also *Gag Rule on Abortion is Eased: Planned Parenthood Calls New Clinic Guidelines a Sham*, CHI. TRIB., Mar. 21, 1992, at 2. In an effort to avoid infringing upon doctor-patient dialogue, President Bush announced new guidelines for the 1988 regulations. *Id.* The guidelines allow physicians in Title X clinics to give abortion advice, even in non-life-threatening situations. *Id.* Physicians may also refer women to abortion facilities, provided such facilities offer a full range of family planning services. *Id.*; Philip J. Hiltz, *White House Allows Some Advice at Public Clinics About Abortion*, N.Y. TIMES, Mar. 21, 1992, at 1. The guidelines may simply have been a product of political motivations. *Id.* One interpretation suggested the Bush Administration tried to "straddle the issue by loosening the restraints on . . . clinics while . . . assuring anti-abortion forces that it was still firmly in their corner." *Id.*; Spencer Rich, *Administration Partly Lifts Ban on Abortion Advice; Regulations Allow Exception for Doctors*, WASH. POST, Mar. 21, 1992, at A1. Nurses, social workers and other clinic personnel are still prohibited from abortion counseling. *Id.* In practice, such workers provide the vast majority of counseling to women coming into the clinics. *Id.*

⁶⁷ See *supra* notes 3-4 and accompanying text (discussing *Roe v. Wade* and its protection of woman's right to decide whether to terminate her pregnancy).

⁶⁸ See *Rust v. Sullivan*, 111 S. Ct. 1759, 1784 (1991) (Blackmun, J., dissenting). Justice Blackmun contended that the majority was allowing the government to interfere with a very intimate and personal decision. *Id.* He believed that the suppression of abortion information was a form of "restrictive ideological message unrelated to considerations of maternal health" and designed to instill the belief that abortion was not a medical option. *Id.* at 1785; Chervin, *supra* note 43, at 425 (receiving incomplete information removes women's voluntary choice concerning reproductive decision).

⁶⁹ See Chervin, *supra* note 43, at 427 (cautioning that government may not use power to manipulate information intended for persons dependent upon that information); see also *Baby Boom America is Losing the Battle Against Teen-age Pregnancy*, BOSTON GLOBE, Feb. 11, 1990 (discussing young women's reproductive options, obstacles thereto and importance of

professionals are required to respond to any abortion inquiry by stating that abortion is not an appropriate method of family planning.⁷⁰ It is suggested that by denying the right to receive complete information, the Court permitted an encroachment upon indigent women's Fifth Amendment rights. The indigent woman who relies on providers for advice and expects complete information regarding the purpose of her visit,⁷¹ unknowingly receives a message controlled by the government.⁷² Relying on this advice, it is likely that many women will follow through with childbirth, believing that no other legitimate option is available.⁷³

Suppression of First Amendment speech disadvantages women by leading them to believe they have received complete counseling, when in fact they have not.⁷⁴ The unavailability of complete information frustrates the exercise of medically sound and constitutionally protected reproductive choices.⁷⁵ It is submitted that

accurate information as depicted in 1987 National Research Council report, *RISKING THE FUTURE: ADOLESCENT SEXUALITY, PREGNANCY, AND CHILDBEARING*).

⁷⁰ See *Grants for Family Planning Servs.*, 42 C.F.R. § 59.8 (b)(5) (1988), *supra* note 31 (prohibiting counseling of abortion as method of family planning).

⁷¹ See *Planned Parenthood Ass'n Chicago Area v. Kempiners*, 568 F. Supp. 1490, 1497 (N.D. Ill. 1983). "It is blinking at reality to say that a woman's counselor, who of necessity occupies a position of great trust and intimacy, discusses only childbirth and refuses to provide any information on abortion, will not have a critical impact upon the woman's decision whether to carry her pregnancy to term." *Id.*; see also *Kendall*, *supra* note 50, at 767 (pregnant women expect complete information). But see *Hirt*, *supra* note 10, at 1913 (First Amendment does not require government to provide balanced viewpoints on pregnancy options).

⁷² See *Rust*, 111 S. Ct. at 1785 (Blackmun, J., dissenting). Justice Blackmun suggested that this prohibition of abortion information was "a restrictive ideological message" to deceive women who would rely on a trusted physician's advice or to delay the exercise of their option long enough to preclude abortion as an alternative. *Id.*

⁷³ See *id.* Most rational women will follow the "perceived advice and carry their pregnancy to term, despite their needs to the contrary and despite the safety of the abortion procedure . . ." *Id.*

⁷⁴ See *Chervin*, *supra* note 43, at 425. Under the new regulations, the clients are actually worse off because they assume that this mandated, biased counseling is complete. *Id.* "Had the client never walked into that clinic, her perception of her options might actually have been less distorted." *Id.* Without the knowledge that she is receiving skewed information, a woman is encountering a government obstacle to her voluntary reproductive decision. *Id.*

⁷⁵ See *Massachusetts v. Secretary of Health and Human Servs.*, 899 F.2d 53, 65 (1st Cir. 1990), *vacated*, 111 S. Ct. 2252 (1991). The court stated that the delay in obtaining information may prevent a pregnant woman from complying with the *Roe v. Wade* trimester framework, thus denying her access to abortion. *Id.* Also concerning the court was that any delay in obtaining necessary information would increase the medical risks inherent in the abortion procedure. *Id.* An affidavit of Dr. George Morley supplied information that the regulations might endanger women by pushing back the time of abortion. *Id.* at 67 n.7. He

the Court's affirmation of the regulations places obstacles in the path of indigent women, for whom Title X was enacted. As recognized in the *Rust* dissent, the government has eradicated freedom of choice as effectively as if it had banned abortions altogether.⁷⁶ Furthermore, the 1988 regulations continue to be inconsistent with congressional intent regarding Title X.⁷⁷

It is proposed that *Rust v. Sullivan*, *Maher v. Roe*, and *Harris v. McRae* signify an indirect assault on the right of abortion through the withholding of government subsidies. A more direct assault on the right of abortion was set forth in *Webster v. Reproductive Health Services*,⁷⁸ where the Supreme Court effectively granted the right to regulate abortion to the states.⁷⁹

II. THE CONSTITUTIONALITY OF STATE ANTI-ABORTION STATUTES

A. *The Demise of Roe v. Wade: Webster v. Reproductive Health Services*

For sixteen years, *Roe v. Wade* signified a woman's right of abortion, qualified by a trimester schedule, which guided states in the regulation of abortion.⁸⁰ It is asserted that the *Webster* Court compromised *Roe v. Wade* by upholding state abortion regulations that

noted that abortions performed later in pregnancy "caused approximately half of all abortion related deaths between 1972 and 1981." *Id.*

⁷⁶ See *Rust v. Sullivan*, 111 S. Ct. 1759, 1785 (1991) (Blackmun, J., dissenting). "The denial of this freedom is not a consequence of poverty but of the government's ill-intentioned distortion of information it has chosen to provide." *Id.*

⁷⁷ See John Deardourff, *John Sununu and the Abortion Gag Rule*, WASH. POST, NOV. 6, 1991, at A25. Immediately following the *Rust v. Sullivan* decision, Republicans in Congress attempted to overturn or block the 1988 regulations. *Id.* This struggle was led by Rhode Island Senator John Chafee and Illinois Representative John Porter. *Id.* Both houses passed bills to overturn the three year old gag rule. *Id.*; see also *supra* note 33 (recounting agency and congressional approval of original policy of Title X); *The Gag Rule, Gagged*, N.Y. TIMES, NOV. 2, 1991, at 22. The President promised to veto these bills. *Id.* Senators who were close to the President cautioned that there would be an ensuing battle. Deardourff, *supra*. Inevitably, the President vetoed these bills. Helen Dewar et al., *House Cuts Abortion Language as It Approves Spending Bill*, WASH. POST, NOV. 23, 1991, at A10. Although both houses had passed these bills by a wide margin, the House was unable to muster the two-thirds majority necessary to override the veto. *Governors Against the Gag Rule*, WASH. POST, DEC. 13, 1991, at A28.

⁷⁸ 492 U.S. 490 (1989).

⁷⁹ *Id.* at 499 (reviewing constitutionality of Missouri statute regulating abortions); see *infra* notes 80-104 and accompanying text (describing *Webster's* effect on right of abortion).

⁸⁰ See *supra* notes 3-4 and accompanying text (discussing holding and rationale of *Roe*).

ran counter to the *Roe* decision. In severing the trimester guidelines and relegating *Roe's* fundamental right of abortion to a liberty interest,⁸¹ the *Webster* Court has left the right of abortion entirely subject to state regulation and possible prohibition.⁸²

In *Webster*, five state-employed health professionals and two nonprofit organizations challenged the constitutionality of a Missouri statute which regulated their performance of abortions.⁸³ In addressing the statute's preamble,⁸⁴ the Supreme Court rejected the lower court's finding that Missouri's adoption of a theory that life begins at conception, improperly justified its regulation of abortions.⁸⁵ Instead, the Court held that the language of the preamble did not regulate abortion but merely made "a value judgment favoring childbirth over abortion."⁸⁶

The majority next reviewed the sections of the statute which made it unlawful for public employees using public facilities to perform or assist in abortions not necessary to save the life of the

⁸¹ *Webster*, 492 U.S. at 520. The Court accused *Roe's* trimester framework of being inconsistent with and independent of the Constitution. *Id.* at 518. Further, the concept had become a "web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine." *Id.* (footnote omitted). Thus, the Court felt that states' interests were as compelling throughout pregnancy as they are after viability. *Id.* at 519 (quoting *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 795 (1986) (White, J., dissenting)).

To view the change in opinion of the right of abortion from a fundamental right to a liberty interest, compare *Roe*, 410 U.S. at 152-56 (stating fundamental right of privacy, including right of abortion, deserved strict scrutiny analysis and could only be interfered with when compelling state interest was great) with *Webster*, 492 U.S. at 520 (depicting right of abortion as mere liberty interest protected by due process and regulation of that right need only bear rational relationship to legitimate state objective).

⁸² See *Webster*, 492 U.S. at 537-38 (Blackmun, J., concurring in part, dissenting in part). The dissent believed the decision "would return to the States virtually unfettered authority to control the quintessentially intimate, personal, and life-directing decision whether to carry a fetus to term." *Id.*

⁸³ *Id.* at 501.

⁸⁴ *Id.* at 504-05. The preamble states that "[t]he life of each human being begins at conception, and that [u]nborn children have protectable interests in life, health, and well-being." *Id.* at 504 (quoting Mo. REV. STAT. §§ 1.205.1(1), 1.205.1(2) (1986)). The statute then mandates that state laws be read to "provide unborn children with 'all the rights, privileges, and immunities available to other persons, citizens, and residents of this state,' subject to the Constitution and this Court's precedents." *Id.* (quoting Mo. REV. STAT. § 1.205.2. (1990)).

⁸⁵ *Id.* at 505-06. The Court noted that the court of appeals improperly relied on dictum in *Roe* that "'a state may not adopt one theory of when life begins to justify its regulation of abortions.'" *Id.* at 505 (quoting *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 444 (1983), citing *Roe v. Wade*, 410 U.S. 113, 159-62 (1973)).

⁸⁶ *Id.* at 506 (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)).

mother.⁸⁷ The lower courts had reasoned that the preclusion of abortions in public facilities does more than demonstrate a value judgment favoring childbirth.⁸⁸ Such preclusion not only restricted and, in some cases, foreclosed the availability of abortions but posed potential delays and cost increases.⁸⁹ The *Webster* Court held that a state is free to implement a value judgment favoring childbirth over abortion through the allocation of funds, as well as through the allocation of hospitals and medical staff.⁹⁰ The Court reasoned that the states are not restricting access to abortion.⁹¹ Rather, it is a woman's indigency which creates the only barrier to a nonfunded abortion.⁹²

The final section addressed by the *Webster* Court stipulated that no physician could perform an abortion on a woman he finds to be at least twenty weeks into her pregnancy, until he first determined whether the unborn child was viable.⁹³ In doing so, the physician should make a necessary finding of the maturity of the unborn child.⁹⁴ Not only would these maturity tests increase the cost of an abortion, but some of these tests would impose significant health risks for both the pregnant woman and the fetus if performed before twenty-eight to thirty weeks of gestation.⁹⁵ To avoid constitutional difficulties,⁹⁶ the Court construed the statute to mean that physicians were to perform maturity tests only if, in their "reasonable professional judgment," such tests would be relevant in determining viability and would not be dangerous to ei-

⁸⁷ *Webster*, 492 U.S. at 507. The lower court had argued that such a provision could also persuade private hospitals to take a pro-life position and thus severely restrict a woman's choice to have an abortion. *Id.* at 509.

⁸⁸ *Id.* at 509 (citing *Reproductive Health Servs. v. Webster*, 851 F.2d 1071, 1081 (8th Cir. 1988)).

⁸⁹ *Id.* (citing *Webster*, 851 F.2d at 1081).

⁹⁰ *Id.* at 510 (quoting *Maier v. Roe*, 432 U.S. 464, 474 (1977)).

⁹¹ *Id.* at 509. The Court asserts that a woman's right to an abortion is only infringed upon "to the extent that she chooses to use a physician affiliated with a public hospital." *Id.*

⁹² *Id.* (quoting *Maier*, 432 U.S. at 474).

⁹³ *Id.* at 513. In determining viability, tests and examinations are necessary to show the unborn child's gestational age, weight, and lung maturity. *Id.* (quoting *MO. ANN. STAT. § 188.029* (Vernon 1986)).

⁹⁴ *See id.*

⁹⁵ *See id.* at 514 (citing *Reproductive Health Servs. v. Webster*, 851 F.2d 1071, 1075 n.5 (8th Cir. 1988)).

⁹⁶ *See id.* (citation omitted). The Court followed the well-established rule that statutes will be interpreted to avoid unconstitutional results. *Id.*

ther mother or fetus.⁹⁷ According to the Court, viability testing was aimed at furthering "the State's interest in potential human life rather than in maternal health."⁹⁸ However, *Roe v. Wade* had permitted state regulation in the second trimester of pregnancy only if reasonably related to maternal health.⁹⁹ Thus, *Webster* limited *Roe*'s trimester framework and extended the state's interest throughout pregnancy.¹⁰⁰ Moreover, the Court replaced the broad fundamental protection afforded by *Roe* and replaced it with the more narrow guarantee of a liberty interest which is protected solely by the Due Process Clause.¹⁰¹

In *Roe v. Wade*, the Supreme Court sought a balance between a woman's fundamental right to do with her body as she wished and the state's interest in maternal health, prenatal life and medical standards.¹⁰² It is submitted that *Webster v. Reproductive Health Services* has upset this balance by allowing the state's interest in potential life to override a woman's right of abortion.

B. Current State Anti-Abortion Statutes: In the Wake of Webster

The *Webster* majority realized its decision would invite governmental regulation that would otherwise be prohibited by *Roe* and its progeny.¹⁰³ The Court's goal was to leave this politically and emotionally charged issue to the state legislatures and their electorates.¹⁰⁴ Accordingly, several states have responded with harsh

⁹⁷ *Id.* at 514-15.

⁹⁸ *Id.* at 515.

⁹⁹ *see id.* at 516; *see supra* note 4 (*Roe* held that regulation of abortions in second trimester by states must be reasonably related to maternal health).

¹⁰⁰ *Id.* at 516-19. In reevaluating the *Roe* trimester system, the Court stated, "[T]he rigid *Roe* framework is hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does." *Id.* at 518. Further, the Court did not "see why the States' interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability." *Id.* at 519.

¹⁰¹ *Id.* at 520; *see supra* note 3 and accompanying text (discussing fundamental right to liberty interest).

¹⁰² *See Roe v. Wade*, 410 U.S. 113, 153-54 (1973).

¹⁰³ *See Webster*, 492 U.S. at 520-21. The Court acknowledged that "[t]here is no doubt that our holding today will allow some governmental regulation of abortion that would have been prohibited." *Id.*: Crain and cases cited *supra* note 6 (describing scope of abortion right derived from *Roe* and its progeny).

¹⁰⁴ *See Webster*, 492 U.S. at 521. The Court stated it is attempting to adhere to the Constitution's balance between what is and is not encompassed by the democratic process. *Id.*

anti-abortion laws.¹⁰⁵

1. Pennsylvania

In 1991, the Pennsylvania legislature amended its Abortion Control Act of 1982¹⁰⁶ to address issues of informed consent,¹⁰⁷ parental consent¹⁰⁸ and spousal notice.¹⁰⁹ The United States District Court for the Eastern District of Pennsylvania reviewed the constitutional validity of these provisions and held, *inter alia*, that the compulsory 24-hour delay, required under the informed consent provision, was unconstitutional.¹¹⁰ The court determined that if a woman is willing to proceed with the abortion after appropriate counseling, then a state may not require that she delay that decision.¹¹¹ The informed consent provision also mandated that

¹⁰⁵ See Joyce Price, *Pro-Lifers See Hope in State Hoppers*, WASH. TIMES, Sept. 16, 1991, at A5. Pro-lifers have had success in state legislatures since July, 1989, when the Supreme Court afforded States more authority to regulate abortions. *Id.* The most strict anti-abortion laws have been enacted in Pennsylvania, Louisiana, Utah and Guam. *Id.* North Dakota, Mississippi, Ohio and Michigan passed laws requiring informed consent, while Nebraska passed a bill requiring notification of one parent for an unmarried minor. *Id.*; cf. Susan Gilmore, *Initiative 120: 'Insurance' Against End of Roe Ruling*, SEATTLE TIMES, Oct. 15, 1991, at B1. Against a flurry of pro-life legislation, several states have enacted measures protecting the basic right of abortion found in *Roe v. Wade*. *Id.* Washington state has presented its voters with an initiative which would protect the right of abortion if *Roe* is overturned by the Supreme Court. *Id.* The initiative would allow abortions until the time of fetal viability without "extraordinary medical measures." *Id.* The state already funds abortions for indigent women and thus has a reputation as being one of the most liberal states on the abortion issue. *Id.* Within the last year, three other states have codified the *Roe* decision. *Id.* In 1990, Connecticut became the first state to guarantee a woman's right of abortion. *Id.* It added mandatory counseling for pregnant women 15 years old or younger. *Id.* The state also funds abortions for indigent women but only by court order. *Id.* Nevada allows abortions up to 24 weeks, after that point they are allowed only to save the life of the mother. *Id.* In Maryland, where parent notification is generally required for minors, the abortion rights bill passed by the legislature has been stalled by opponents and will be voted on next year. *Id.*

As for state funding of abortion, nine states voluntarily pay with few restrictions, while four states pay under court order. *Id.* When the 1988 Title X regulations were passed to prohibit clinics from engaging in abortion speech, Washington state vowed to shift its money to cover the federal segment. *Id.*

¹⁰⁶ 18 PA. CONS. STAT. ANN. §§ 3201-3220 (1983 & Supp. 1991).

¹⁰⁷ See *id.* § 3205.

¹⁰⁸ See *id.* § 3206.

¹⁰⁹ See *id.* § 3209.

¹¹⁰ Planned Parenthood of Southeastern Pa. v. Casey, 744 F. Supp. 1323, 1378-79 (E.D. Pa. 1990) (citing Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 450-51 (1983)) (basing decision on Akron precedent), *rev'd in part, aff'd in part*, 947 F.2d 682 (3d Cir. 1991), *cert. granted*, 60 U.S.L.W. 3498 (Jan. 21, 1992).

¹¹¹ Casey, 744 F. Supp. at 1378 (quoting Akron, 462 U.S. at 450-51).

certain information be provided to all women at least 24 hours prior to obtaining an abortion.¹¹² Applying Supreme Court precedent, the court invalidated the informed consent requirement, stating that it represented "the dissemination of information that is not relevant to such consent, and . . . advances no legitimate state interest."¹¹³ It is submitted that this targeted information is an intrusive attempt by the government to discourage abortions and promote childbirth.

The Pennsylvania statute also required the consent of one parent or guardian of a pregnant unemancipated minor or incompetent woman,¹¹⁴ but judicial bypass of such consent was available.¹¹⁵ Precedent has established that states cannot give parents an absolute veto,¹¹⁶ but may furnish them with notice or consent powers if safeguarded by a judicial bypass procedure.¹¹⁷ However, the court determined that the Pennsylvania requirement that parents must not only consent, but first be fully informed, would force

¹¹² See *id.* at 1380; see also 18 PA. CONS. STAT. ANN. § 3205 (Supp. 1991). The statute requires that the physician inform the woman orally of:

(i) The nature of the proposed procedure or treatment and of those risks and alternatives to the procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo abortion.

(ii) The probable gestational age of the unborn child at the time the abortion is to be performed.

(iii) The medical risks associated with carrying her child to term.

Id. Moreover, the statute requires that the woman be informed of materials which describe the unborn child, organizations which offer alternatives to abortion, medical benefits the woman may be entitled to, and that the unborn child's father is liable for child support. *Id.*

¹¹³ *Casey*, 744 F. Supp. at 1381 (quoting *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 762-63 (1986)) (citations and footnotes omitted); see *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 444-45 (1983) (striking down detailed fetal development and other informed consent requirements similar to Pennsylvania's).

¹¹⁴ *Casey*, 744 F. Supp. at 1382; see 18 PA. CONS. STAT. ANN. § 3206(a), (b) (1983 & Supp. 1991).

¹¹⁵ See *id.* at 1383. This option avoids the situation where a sufficiently mature woman, who is a minor, is precluded from obtaining an abortion because of an "absolute veto" by her parents. *Id.*; cf. 18 PA. CONS. STAT. ANN. § 3206(c)-(f) (1983 & Supp. 1991).

¹¹⁶ *Casey*, 744 F. Supp. at 1382 (refusing to provide parents with absolute veto because of potential for arbitrariness) (citing *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1976)).

¹¹⁷ *Id.* at 1383. Precedent has held that a state may require the consent of a parent if it also provides a judicial by-pass procedure. *Id.* The procedure entitles a minor to demonstrate sufficient maturity or circumstances making an abortion in her best interests. *Id.* (citing *Akron*, 462 U.S. at 439-40, *Ohio v. Akron Center for Reprod. Health*, 110 S. Ct. 2972, 2972 (1990) and *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2926 (1990)).

more women to follow the judicial bypass procedure, unduly burdening the woman's decision.¹¹⁸

The final section under review required a physician to obtain a signed statement from a pregnant woman that her husband had been notified.¹¹⁹ Such general spousal consent requirements have been invalidated by the Supreme Court.¹²⁰ The district court concluded that this requirement did not serve a compelling state interest in promoting marital integrity.¹²¹

On appeal, the United States Court of Appeals for the Third Circuit held that only the spousal notice requirement was unconstitutional.¹²² The court based its decision on an undue burden test, even though the Supreme Court has never supported such a test in the past.¹²³ It is suggested that, by disregarding established precedent, the Third Circuit has granted the Pennsylvania legislature license to impede the exercise of a woman's right of abortion. Such obstacles, however, may not be placed in the path of a woman's constitutional freedom of choice.¹²⁴ Because of the important constitutional issues raised, the Supreme Court announced that it would review Pennsylvania's abortion regulations during the 1992-93 term.¹²⁵

¹¹⁸ See *id.* at 1384.

¹¹⁹ *Id.* (citing 18 PA. CONS. STAT. ANN. § 3209 (Supp. 1991)).

¹²⁰ *Id.* at 1386-87 (noting Supreme Court's refusal to condition abortion decision on consent of husband) (citing *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 67-72 (1976)).

¹²¹ *Id.* at 1387. The court reasoned that since many of today's marriages are not based on "mutual communication, decision-making and respect," a spousal veto could serve to further harm an already unstable marriage. *Id.* at 1388.

¹²² *Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682, 713 (3d Cir. 1991).

¹²³ See *id.* at 697-98; see also Michael D. Hinds, *Appeals Court Upholds Limits for Abortions*, N.Y. TIMES, Oct. 22, 1991, at A1, A16. The appellate court had based its reasoning on the undue burden standard which it concluded was binding and "the law of the land." *Id.* at A7. However, Justice O'Connor is the only member of the Supreme Court who has explicitly adopted such a standard. *Id.* Legal experts believe the Third Circuit's decision is a prediction of how the Supreme Court will rule, and that a motivation of the Court was that its decision not be overturned. *Id.*; see also Ruth Marcus, *Most of Abortion Curb in Pennsylvania Upheld; U.S. Appeals Panel Cites High Court Rulings*, WASH. POST, Oct. 22, 1991, at A1 (reporting court of appeal's reliance on undue burden standard which majority of Supreme Court has not adopted).

¹²⁴ See *Harris v. McRae*, 448 U.S. 297, 316 (1980) (stating that government may not burden woman's exercise of right of abortion but need not remove obstacles it has not created).

¹²⁵ See Ruth Marcus, *Justices to Rule on Pennsylvania Abortion Limits: Supreme Court's Timing Assures Focus on Issue in Fall Campaigns*, WASH. POST, Jan. 22, 1992, at A1. The Pennsyl-

2. The True Contenders to *Roe v. Wade*: Louisiana, Utah and Guam

Although the Pennsylvania anti-abortion law does not directly challenge *Roe v. Wade*, statutes in Louisiana, Utah and Guam directly confront the abortion right created in *Roe*.¹²⁶

a. Louisiana

In the summer of 1991, the Louisiana state legislature overrode the Governor's veto and passed a bill which criminalized abortion, except in situations of rape or incest or to save the life of the mother.¹²⁷ A case challenging the new law was heard in the United States District Court for the Eastern District of Louisiana.¹²⁸ where the Louisiana statute was equated to the one declared unconstitutional in *Roe v. Wade*.¹²⁹ Asserting that *Roe* was still "the law of the land," the court held that the Louisiana statute was unconstitutional.¹³⁰ The district court judge cautioned

vania statute is "one of a spate of abortion statutes enacted in the wake of the high court's 1989 ruling in *Webster v. Reproductive Health Services*, which gave states more leeway to restrict abortion." *Id.* Arguments for *Planned Parenthood of Southeastern Pa. v. Casey* are anticipated in April, 1992, with a final determination before the Court recesses in July. *Id.*; see also Christine Spolar & Molly Sinclair, *70,000 March Against Abortion: Bush Encourages Demonstrators on 19th Anniversary of Roe*, WASH. POST, Jan. 23, 1992, at A1 (reporting on Bush's plea for alternatives to abortion before March of Life demonstrators just days after Supreme Court announced decision to rule on Pennsylvania abortion statute).

¹²⁶ See Tony Mauro, *Upcoming Term to Offer Supreme Court Full Plate*, N.J. L.J., Aug. 29, 1991, at 68 (predicting constitutional challenge to *Roe v. Wade* and characterizing Louisiana as possibly toughest statute among state anti-abortion laws); see also Hinds, *supra* note 123, at A7. The Pennsylvania Attorney General, Ernest D. Preate, Jr., urged that the Pennsylvania statute was a reasonable, "middle-of-the-road" control on abortion and not a complete ban. *Id.* The statutes enacted by Louisiana, Utah and Guam are considered much more restrictive than Pennsylvania's and criminalize most abortions. *Id.*; Marcus, *supra* note 123, at A1 (quoting National Right to Life Committee which encourages states to enact abortion restrictions and which described Pennsylvania's statute as "extremely moderate"); Price, *supra*, note 105 (describing stringent anti-abortion laws and depicting Louisiana's as "most significant" because it directly attacks *Roe*).

¹²⁷ See LA. REV. STAT. ANN. §14:87 (West 1986 & Supp. 1991); *Group: Abortion Law in La. Toughest*, NEW ORLEANS TIMES, Jan. 8, 1992, at A6 (ranking Louisiana's abortion statute as most severe law in United States); see also *A Record Veto*, NEW ORLEANS TIMES, June 20, 1991, at B6 (memorializing this as first legislative override of Governor's veto in Louisiana); Garry Boulard, *U.S. Abortion Travail Small Step Closer to Resolution*, CHRISTIAN SCI. MONITOR, Aug. 13, 1991, at 7 (describing legal and political battle over abortion in Louisiana).

¹²⁸ *Sojourner v. Roemer*, 772 F. Supp. 930 (E.D. La. 1991).

¹²⁹ *Id.* at 931.

¹³⁰ *Id.*

that a Supreme Court precedent could only be overruled by the Supreme Court,¹³¹ and that lower courts must follow such precedent "no matter how misguided the judges of those courts may think it to be."¹³² It is submitted that this analysis is the proper approach when reviewing state attempts to restrict the right of abortion, because the Supreme Court intended *Roe* to afford every pregnant woman the security of a right of abortion regardless of the state in which she resides. Instead of applying a standard that the Supreme Court has not even adopted, it is further urged that the Third Circuit should have relied upon *Roe* when reviewing the Pennsylvania statute, thus preserving the right of abortion for women nationwide as *Roe* intended.

b. Utah

Another of the nation's most stringent laws allows abortions to save the life of the mother, to prevent grave damage to her health, to prevent grave fetal deformity, or in reported cases of rape and incest.¹³³ The law is being challenged at the federal level by the American Civil Liberties Union and the Planned Parenthood Association as unconstitutionally vague.¹³⁴ The plaintiffs contend that the law is "too broad, violates free speech rights and denies citizens their right to know what constitutes a crime under the law."¹³⁵ Although the statute was amended to remove severe criminal penalties, doctors still face a five year sentence and

¹³¹ *Id.* (citing *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983)).

¹³² *Id.* (citing *Hutto v. Davis*, 454 U.S. 370, 375 (1981)).

¹³³ UTAH CODE ANN. § 76-7-302 (1990 & Supp. 1991).

¹³⁴ See *Liberty v. Bangerter*, No. 91-C-345G (C.D. Utah 1991); *Federal Judge Refuses to Delay Utah Abortion Suit*, REUTERS, Sept. 10, 1991, available in LEXIS, Nexis Library, REUTERS file [hereinafter *Federal Judge*] (reporting constitutional challenge to Utah abortion law in federal court by American Civil Liberties Union and Utah Planned Parenthood); *Suit Filed Challenging Utah Abortion Law*, NAT'L L.J., Apr. 22, 1991, at 6 [hereinafter *Suit Filed*] (depicting American Civil Liberties Union and Planned Parenthood as plaintiffs challenging constitutionality of Utah abortion statute in *Bangerter*).

¹³⁵ See *Suit Filed*, *supra* note 134, at 6 (depicting constitutional challenges as violations of "right of privacy, equal protection, freedom of religion, due process, free speech and freedom from involuntary servitude"); *Utah Abortion Law is Suspended*, N.Y. TIMES, Apr. 10, 1991, at A18 (recounting April filing of *Liberty v. Bangerter* where plaintiffs challenged Utah abortion statute as broad, vague and violation of free speech).

a \$5,000 fine for performing illegal abortions.¹³⁶ Enforcement of this law has been suspended pending a final determination of the case.¹³⁷

c. Guam

In the interest of protecting the unborn child from the moment of conception, the Guam legislature, with the support of its governor, passed a bill in 1990 revising the territory's abortion statutes.¹³⁸ Consequently, abortions in Guam may be performed only if the continued pregnancy would endanger the life of the mother or would gravely impair her health.¹³⁹ Both the physician and the pregnant woman can be criminally sanctioned for any violation.¹⁴⁰ Solicitation of abortions from women seeking these services or by physicians advertising them is also criminalized.¹⁴¹ The Guam Society of Obstetricians and Gynecologists, doctors, nurses and their patients commenced suit against the Governor and others challenging the constitutionality of the statute.¹⁴² The federal district court addressed the issue of whether *Roe v. Wade* is controlling law in the territory of Guam.¹⁴³ The district court answered affirmatively and permanently enjoined the defendants from enforcing

¹³⁶ See *Suit Filed*, *supra* note 134, at 6 (reporting on criminal homicide charges under Utah's new abortion statute); *The New Fetal Police*, NAT'L L.J., Aug. 26, 1991, at 13. Under the original version of Utah's abortion statute, women could have faced the electric chair or gas chamber and doctors could have been prosecuted for first degree murder. *Id.*; see also Mimi Hall, *Abortion Issue Can Produce Flaws in Laws*, USA TODAY, Apr. 18, 1991, at 6A. The Utah legislature removed provisions that could have subjected Utah women to the death penalty. *Id.* However, they overlooked a provision that allows a charge of double homicide against someone who might kill a pregnant woman. *Id.*; *Abortion Law Change*, NEWSDAY, Apr. 19, 1991, at 16 (reporting amendment to Utah's abortion statute eliminating murder charge); *Federal Judge*, *supra* note 134 (pointing to five year sentence and \$5000 fine against doctors performing illegal abortions even though criminal penalties were removed).

¹³⁷ See *Suit Filed*, *supra* note 134, at 6 (reporting that effective date of Utah anti-abortion statute is stayed pending determination of suit brought by American Civil Liberties Union and Planned Parenthood); *Utah Abortion Law Suspended Pending Litigation*, UNITED PRESS INT'L, July 11, 1991 (discussing suspension of Utah's abortion law pending suit).

¹³⁸ 9 GUAM CODE ANN. §§ 31.20-23 (1990).

¹³⁹ *Id.* § 31.20.

¹⁴⁰ *Id.* §§ 31.21-22.

¹⁴¹ *Id.* §§ 31.22-23.

¹⁴² *Guam Soc'y of Obstetricians and Gynecologists v. Ada*, 776 F. Supp. 1422 (D. Guam 1990).

¹⁴³ *Id.* at 1426.

the unconstitutional statute.¹⁴⁴ Not only did the statutory mandate fail to account for the trimester framework of *Roe*, but the court found that the ban on solicitation was violative of the First Amendment's guarantee of free speech.¹⁴⁵

The Supreme Court in *Webster v. Reproductive Health Services* denied that its decision would serve as an invitation to states to enact abortion laws "reminiscent of the dark ages."¹⁴⁶ The aforementioned statutes contradict that denial and demonstrate the power of pro-life constituents in the states.¹⁴⁷ It is submitted that pro-life states determined to eradicate the right of abortion within their boundaries will do so through austere regulations. It is further asserted that these severe regulations will continue to plague the Supreme Court as a result of its irreverent approach to *Roe v. Wade*.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1429 n.9 (quoting *Texas v. Johnson*, 491 U.S. 397, 413 (1989)).

¹⁴⁶ *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 521 (1989). The majority faults the dissent for suggesting that its decision would redeliver the horrors of illegal and unsafe abortions as they were before *Roe v. Wade*. *Id.* at 538, 557-58. The Court stated that this result is not what it intended and that the mere suggestion insults congressional representatives and their electorate. *Id.*

¹⁴⁷ See *supra* notes 126-45 and accompanying text (describing harsh anti-abortion statutes in Louisiana, Utah and Guam which prohibit abortions with few exceptions); *TRIBE*, *supra* note 1, at 177-91. Professor Tribe explains that there is a strong political impetus behind the abortion controversy which was fired by the *Webster* decision. *Id.* at 177-79. The legislative bodies had become increasingly pro-life through single-issue voting. *Id.* at 178-79. The pro-life camps were adamant about the fight, i.e., politicians who were not pro-life would not get pro-life votes, while their pro-choice counterparts would not let the abortion issue be the deciding factor in an election. *Id.* at 179. However, many pro-choice organizations formulated "a comprehensive strategy aimed primarily at state legislatures." *Id.* at 178; Burt Solomon, *Even for a President on a Roll*, *NAT'L J.*, July 20, 1991, vol. 23, no. 29, at 1816 (depicting abortion as possible pivotal issue in next presidential election); Price, *supra* note 105 (addressing pro-life successes in state legislatures and opposing pro-choice strategy).

The effect abortion has on the federal government can be seen in a bill called the Freedom of Choice Act which was introduced in the Senate and reached the House floor. *TRIBE*, *supra* note 1, at 191-92. The bill was designed to prohibit states from restricting previability abortions or later abortions necessary to save the life or health of the mother. *Id.* at 191; Price, *supra* note 105, at A1 (depicting intense lobbying on Congress to broaden or reduce abortion rights and pro-choice push for federal Freedom of Choice Act giving national legal right of abortion and preventing state interference); cf. Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 *VA. L. REV.* 265, 287-90 (1990). In the wake of *Webster*, it is predicted that Congress will not preempt the abortion field. *Id.* at 287. Due to the absolute nature of the abortion controversy, the area is better left to local legislatures. *Id.* at 287-88. Congress will avoid entering this arena because of the serious political risks to its members. *Id.* at 290. Thus, Congress will use the state legislatures as a political buffer and shift the risk of error to local politicians. *Id.*

III. SUPREME COURT DECISION-MAKING

The doctrine of stare decisis¹⁴⁸ could arguably bind the Supreme Court to the enunciated rule of law in *Roe v. Wade*.¹⁴⁹ The legitimacy of the Supreme Court as a legal institution rests on the public's confidence in the neutrality and objectivity of its members and the consistency of its decisions.¹⁵⁰ For sixteen years, the American people, their elected representatives and the lower courts have relied on the right of abortion.¹⁵¹ Following a pure stare decisis argument, it is submitted that the Supreme Court should have sustained *Roe v. Wade* against the oppression of funding¹⁵² and state regulation cases.¹⁵³

Although stare decisis has been characterized as binding and authoritative, it must accommodate the inevitable growth of the

¹⁴⁸ See WILLIAM O. DOUGLAS, STARE DECISIS 7 (1949). Justice Douglas depicted stare decisis as a strong recommendation to judges "to hold steadfast to ancient precedents lest the courts themselves add fresh doubt, confusion, and concern over the strength of our institutions." *Id.*; RUSSELL F. MOORE, STARE DECISIS 4 (1958). Stare decisis is an English common law principle whereby courts adhere to their precedents and apply them to future cases that are factually similar. *Id.*; BLACK'S LAW DICTIONARY 1406 (6th ed. 1990) (defining stare decisis as abiding by or adhering to decided cases).

¹⁴⁹ See *supra* notes 3-4 and accompanying text (holding and rationale of *Roe v. Wade*).

¹⁵⁰ See J. CALVI & S. COLEMAN, AMERICAN LAW AND LEGAL SYSTEMS 30-31 (1989) (stability and predictability are goals of stare decisis); JOEL B. GROSSMAN & RICHARD S. WELLS, CONSTITUTIONAL LAW AND JUDICIAL POLICY MAKING 11 (3d ed. 1988) (stating that legitimacy is gained from faithfulness to law and its enforcement); Edward D. Re, *Stare Decisis*, in EDUCATION AND TRAINING SERIES 2 (1975). Stare decisis "preserve[s] continuity, manifest[s] respect for the past, assure[s] equality of treatment for litigants similarly situated, spare[s] judges the task of re-examining rules of law with each succeeding case, and afford[s] the law a desirable measure of predictability." *Id.*; James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 347 (1986) (asserting that "[t]he Anglo-American version of stare decisis promotes important values of the rule of law: fairness, stability, predictability, and efficiency"); Christopher E. Smith, *The Supreme Court in Transition: Assessing the Legitimacy of the Leading Legal Institution*, 79 KY. L.J. 317, 322-26 (1990-91) (describing importance of legitimacy and public perception of Court's role in decision-making). But see Christopher E. Smith, *Bright-Line Rules and the Supreme Court: The Tension Between Clarity in Legal Doctrine and Justices' Policy Preferences*, 16 OHIO N.U. L. REV. 119, 133-37 (1989) (providing cases where justices have interposed personal policy preferences, thus disregarding stability and predictability).

¹⁵¹ Compare *Roe v. Wade*, 410 U.S. 113 (1973) (enunciating right of abortion) with *Weber v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (detracting from that right).

¹⁵² See *supra* notes 10-77 and accompanying text (presenting state abortion funding cases of *Maher* and *Harris* and federal abortion funding decision of *Rust* as assaults on right of abortion).

¹⁵³ See *supra* notes 79-147 and accompanying text (depicting intrusive, even prohibitive, nature of several state attempts at regulating abortion).

law¹⁵⁴ and yield to unfortunate error.¹⁵⁵ Further, stare decisis has less weight in constitutional cases¹⁵⁶ and the Court has overruled its own constitutional precedents on more than one hundred and thirty occasions in the past.¹⁵⁷ These aspects of the doctrine, coupled with the tremendous opposition to the *Roe* decision, lend considerable support for *Roe's* abandonment.¹⁵⁸ Additionally, it is

¹⁵⁴ See *Re*, *supra* note 150, at 1 (acknowledging seemingly incongruent nature of stare decisis when law has changed).

¹⁵⁵ See *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991) ("when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.' " (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)); *MOORE, supra* note 148, at 33-34 (1958). The Supreme Court will reject stare decisis if it believes it has erred even if the rule of law has been followed for many years. *Id.*; *Re, supra* note 150, at 9-11. When the law has been "misunderstood or misapplied," there should be reversal. *Id.* at 9 (citing KENT, COMMENTARIES 475 (12th ed. 1896)); cf. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 12-13 (1921) (espousing theory that law is product of judicial predisposition, created not discovered).

¹⁵⁶ See *Webster*, 492 U.S. at 518. The Supreme Court can make "needed changes" in constitutional cases and has done so in the past. *Id.* (citations omitted); *United States v. Scott*, 437 U.S. 82, 101 (1978), *cert. denied*, 440 U.S. 929 (1979). The Court recognized that in federal constitutional cases the Court must defer to "the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." *Id.* (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting)); see also *Burnet*, 285 U.S. at 406-08 (Brandeis, J., dissenting) (holding that although stare decisis is commanding, constitutional matters are nearly impossible to correct through legislative action and thus Supreme Court has often overruled earlier decisions); *DOUGLAS, supra* note 148, at 9 (affirming that in constitutional law, stare decisis is attenuated); *Smith, supra* note 149, at 337 (asserting that growing conservative majority shows little reluctance to reverse constitutional case precedents, even where there are judicial decisions over many years solidifying original precedent).

¹⁵⁷ See Michael P. Pfeifer, *Abandoning Error: Self-Correction by the Supreme Court*, in ABORTION AND THE CONSTITUTION 5 (1987) (depicting fallibility of Supreme Court which is necessarily and frequently correcting itself through reversals); see, e.g., Alstyne, *supra* note 3, at 1683 n.19. The Supreme Court upheaved longstanding case law when it overruled *Plessy v. Ferguson*, 163 U.S. 537 (1896) by *Brown v. Board of Educ.*, 347 U.S. 483 (1954). *Id.* *Plessy* had been followed by thousands of decisions without question for over fifty years. *Id.* *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) overruled the "century-old" diversity case of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) on constitutional grounds. *Id.* More recently, the Supreme Court overruled the constitutional holding of National League of Cities v. Usery, 426 U.S. 833 (1976) by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). *Id.* See generally John P. Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1 (1983) (discussing significance of stare decisis from judicial point of view).

¹⁵⁸ See generally ABORTION: FREEDOM OF CHOICE AND THE RIGHT TO LIFE 187-217 (Lauren R. Sass ed., 1978) (outlining newspaper articles covering problematic results of right of abortion with respect to debate of when life begins); *TRIBE, supra* note 1, at 16-21, 143-47, 161-96 (presenting tremendous response to *Roe v. Wade* which was primarily won by pro-life activists); William B. Ball, *Case Tactics and Court Strategies for Reversing Roe v. Wade*, in ABORTION AND THE CONSTITUTION 185-93 (Dennis J. Horan et al. eds., 1987) (offering steps to destroy "bizarre decision" of *Roe v. Wade* and thus accomplish "a total erasure of legal

contended that the Court's lack of commitment to the principles of *Roe*, as evidenced by the funding and regulation cases examined above, demonstrates strong judicial disfavor toward continuing a national right of abortion. Thus, it is suggested that *Roe's* demise is inevitable, although it may occur through a less exacting method than express overruling.

The Supreme Court has chosen the unobtrusive course of sub silentio¹⁵⁹ overruling to return the right of abortion to the states¹⁶⁰ and to avoid the potential for social uproar. Repudiating a precedent without expressly overruling it is the crux of the sub silentio tactic.¹⁶¹ Its effect can be discerned by examining how the

access to abortion on demand"); John R. Connery, S.J., *The Ancients and the Medievals on Abortion: The Consensus the Court Ignored*, in *ABORTION AND THE CONSTITUTION* 123-35 (Dennis J. Horan et al. eds., 1987) (describing *Roe's* treatment of history of abortion in western world as "one of the most-garbled and error-laden parts of *Roe v. Wade*"); Roger H. Davidson, *Procedures and Politics in Congress*, in *THE ABORTION DISPUTE AND THE AMERICAN SYSTEM* 30-46 (Gilbert Y. Steiner ed. 1983) (recounting opposition to *Roe* and its relentless influence on Congress); Alstyne, *supra* note 3, 1677-88 (discrediting *Roe* by distinguishing its right to destroy third-party life from any right protected by privacy); Ely, *supra* note 3, at 935-36 (refuting rationale of *Roe v. Wade* even though admitting to being pro-choice); William J. Wagner, Book Review, 35 CATH. U. L. REV. 335, 335-36, 350-52 (1985) (reviewing GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW* (1985)) (discussing how individual morality has largely influenced legal value judgments and concluding that *Roe v. Wade* was disastrous).

¹⁵⁹ See *Sojourner v. Roemer*, 772 F. Supp. 930, 932 n.2 (E.D. La. 1991) (citing BLACK'S LAW DICTIONARY 1428 (6th ed. 1990)) (defining sub silentio as under silence, without any notice being taken).

¹⁶⁰ See James Bopp, Jr. et al., *Does the United States Supreme Court Have a Constitutional Duty to Expressly Reconsider and Overrule Roe v. Wade?*, 1 SETON HALL CONST. L.J. 55, 57 (1990) [hereinafter *Constitutional Duty*]. Some commentators believe that the Supreme Court has approached the *Roe* decision from a sub silentio standpoint. *Id.* "[A] majority of the Court has now abandoned the foundation of abortion jurisprudence enunciated in *Roe v. Wade* By doing so, the Court has sub silentio overruled *Roe*." *Id.* at 77 (footnote omitted); James Bopp, Jr. & Richard E. Coleson, *Webster and the Future of Substantive Due Process*, 28 DUQ. L. REV. 271 (1990). "Because of the lack of majority support for several key elements of *Roe*, the case is *de facto* overruled The elements of *Roe* which are sub silentio overruled go to the heart of the current abortion constitutional analysis." *Id.* at 277. The trimester framework and fundamental protection surrounding the right of abortion have been eliminated. *Id.* at 277-78. The undue burden standard is now the "*de facto* threshold standard of review" for abortion regulations. *Id.* at 278. Finally, substantive due process analysis has been "*de facto* modified" in abortion cases so that a state no longer needs to enact statutes "narrowly tailored" to the objectives of its compelling interest. *Id.* But see *Webster*, 492 U.S. at 532-37 (Scalia, J., concurring). Scalia, in his concurrence, labels the Court's acts as an avoidance of the issue, which he believes is different and far worse than sub silentio overruling. *Id.*

¹⁶¹ See J.M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 947 (1988) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)) (quoting Raoul Berger, *A Study of Youthful Omniscience: Gerald Lynch on Judicial Review*, 36

funding and regulation decisions detract from the tenets of *Roe v. Wade*.¹⁶² Although sub silentio overruling is a common practice in our system of jurisprudence,¹⁶³ it often clouds the law and undermines the legitimacy of both the new decision and the precedent.¹⁶⁴ Stability is better achieved when the Court directly reviews the weaknesses of the prior case law and completely, rather than partially, overrules it.¹⁶⁵ By giving credibility to both the funding and regulation cases in addition to *Roe v. Wade*, it is submitted that this sub silentio overruling has encouraged lower courts to diverge and adopt a rule of law in accord with its policy preferences, yielding the right of abortion to the whims of the state legislatures and courts. It is suggested that the Supreme Court has accepted these dangers and will continue to employ the *sub silentio* tactic until *Roe* is completely dismantled or until the Court is able to overrule the decision without recalcitrant opposition.

CONCLUSION

Supreme Court decision-making from *Maher v. Roe* to the recent case of *Rust v. Sullivan* illustrates the Court's intention to render *Roe v. Wade* a paper tiger. The *sub silentio* elimination of a

ARK. L. REV. 215 (1982)) ("In the history of the Court many a decision has been overruled *sub silentio* . . .").

¹⁶² See *Constitutional Duty*, *supra* note 160, at 75 (citing CONGRESSIONAL RESEARCH SERVICE THE CONSTITUTION OF THE UNITED STATES, ANALYSIS AND INTERPRETATION 2117 & Supp. 1988) (explaining that overrulings are not always express and many times must be deduced from principles of related cases).

¹⁶³ See *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 127 (1984) (Stevens, J., dissenting) (claiming at least 28 sub silentio repudiations by Supreme Court in last century); *Constitutional Duty*, *supra* note 160, at 75 (citation omitted) (proposing that *sub silentio* reversals are commonplace in Supreme Court decision-making); see, e.g., *Stone v. Powell*, 428 U.S. 465, 519 n.14 (1976) (Brennan, J., dissenting) (stating that Court in *Stone* achieves its decision without expressly overruling "diametrically contrary precedents").

¹⁶⁴ See *Bopp & Coleson*, *supra* note 160, at 272. With a sub silentio overruling, courts and legislatures will be uncertain as to the state of abortion law. *Id.*; *Constitutional Duty*, *supra* note 160, at 75. In recent abortion cases, the Supreme Court "skirted its obligation to say what the law is." *Id.* Varying interpretations of these decisions demonstrate the extent of resulting confusion and thus "legislatures will be hard pressed to ascertain the constitutional limits on their discretion to act." *Id.*; see also Joan Stumpf, Comment, *A New Standard for Ineffective Assistance of Counsel Claims—Commonwealth v. Pierce*, 61 TEMP. L. REV. 515, 534-35 (1988) (claiming that *sub silentio* overruling obscures existing caselaw and impacts precedential value).

¹⁶⁵ See *Stumpf*, *supra* note 164, at 534-35 (asserting that overruling should occur by directly addressing faulty area of law and completely and expressly overturning it).

national right of abortion leaves that right to the designs of state legislatures, a majority of which are pro-life. Under this approach, the Supreme Court has ceded a woman's reproductive right to the dictates of her state's political polarization. As Justice Blackmun stated in his dissenting opinion in *Webster*, "I fear for the future. I fear for the liberty and equality of the millions of women who have lived and come of age . . . since *Roe* was decided. I fear for the integrity of, and public esteem for, this Court."¹⁶⁶

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¹⁶⁶ *Webster*, 492 U.S. 490, 538 (1989) (Blackmun, J., dissenting).